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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-752

THE BOEING COMPANY AND THOMAS R. WILCOX,

Petitioners,

—v.—

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE BOEING COMPANY AND THOMAS R. WILCOX,

Petitioners,

—v.—

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment entered on July 14, 1975, by the United States Court of Appeals for the Second Circuit which judgment reversed and remanded in part and affirmed in part, a judgment of the United States District Court for the Southern District of New York dismissing on the merits a consolidated class action brought both under the Securities Exchange Act of 1934 (the "1934 Act" 15 U.S.C. § 78a *et seq.*) and the Trust Indenture Act of 1939 (the "1939 Act" 15 U.S.C. § 77aaa *et seq.*) and on principles of pendent jurisdiction on behalf of a class consisting of all unregistered holders of certain convertible debentures of The Boeing Company ("Boeing") who failed to exercise their conversion privilege prior to its expiration on March 29, 1966.

After trial without jury the District Court concluded that the plaintiff class had failed to establish a cause of action under either the 1934 Act or the 1939 Act and that the notice given to such debenture holders of the redemption of their securities had been in full compliance with the requirements of the indenture under which the debentures had been issued and was reasonable, valid and adequate.* The Court of Appeals reversed in part and remanded, finding that the federal law claim was "colorable", thus in its view allowing it to assume jurisdiction over the pendent claims based exclusively on state law. The Court of Appeals then proceeded to hold (a) that published newspaper notice called for by the indenture and actually given by Boeing of the call of the debentures for redemption had not been adequate and (b) that debenture holders had not been adequately informed as to the kind of notice of redemption they would receive if a call occurred.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, filed July 14, 1975 has not yet been officially reported and is set forth in Appendix A hereto.** The opinion of the United States District Court for the Southern District of New York, filed November 29, 1973, has never been officially reported and is set forth in Appendix B hereto. The opinion of the District Court on Boeing's motion for class action certification is reported in 259 F. Supp. 125 (S.D.N.Y. 1966).

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* The District Court's finding that Boeing correctly calculated the conversion rate in effect at the time of the call of the debentures for redemption was affirmed by the Court of Appeals and is not the subject of this petition.

** The opinion is reprinted at [Current Binder] CCH Fed. Sec. L. Rep. ¶ 95,234 (2d Cir. 1975).

Jurisdiction

The Judgment of the Court of Appeals was entered on July 14, 1975. No petition for rehearing was filed. The mandate of the Court of Appeals has been stayed until September 22, 1975 pursuant to Boeing's motion. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether a federal court can entertain pendent jurisdiction over exclusively state law claims when the federal law claim is held to be merely "colorable" and not "substantial"?

2. Whether full compliance by an issuer of securities with all terms of its indenture as to the notice to be given upon a call of its convertible debentures for redemption can nevertheless give rise to a right to additional notice in excess of that provided by the indenture?

Statute Involved

Section 27 of the 1934 Act (15 U.S.C. § 78aa) provides in relevant part:

> "The district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder."

Section 10(b) of the 1934 Act (15 U.S.C. § 78j(b)) provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> • • •
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b(5), 17 C.F.R. § 240 10b-5 promulgated thereunder provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security."

Statement of the Case*

A. *The 1958 Offering*

At a special meeting held on June 23, 1958, the Board of Directors of Boeing authorized the creation of an issue of convertible subordinated debentures due July 1, 1980 (the "Debentures") to be issued in an aggregate principal amount of $30,597,600. At that meeting the Board of Directors also approved a subscription offer by Boeing to its stockholders of the $30,597,600 principal amount of the Debentures. The Board appointed City Bank Farmers Trust Company ("City Bank") as subscription agent and The Chase Manhattan Bank ("Chase") as Trustee under the indenture (the "Indenture") pursuant to which the Debentures were issued.

The Debentures were subsequently registered with the Securities and Exchange Commission ("SEC") and listed on the New York Stock Exchange ("NYSE") pursuant to a Listing Agreement between Boeing and the NYSE. On July 15, 1958 stockholders of record were offered the right to subscribe to the Debentures. All Boeing stockholders whose names and addresses appeared in Boeing's stock register, then in possession of City Bank, received fully transferable warrants for each share of stock held on the record date. Between July 16, 1958 and July 29, 1958, the date when the subscription offer expired, over seven million rights were issued and more than 1.7 million of the warrants were traded on the NYSE. A list of the names of all shareholders to whom warrants were initially sent was destroyed by City Bank by July 31, 1959. During

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* Prior to trial the parties stipulated to most of the facts involved in this action. This statement of facts is drawn from that stipulation.

The notice of redemption as published, advised the holders of the Debentures of the call and of their option to convert which would expire on March 29, 1966. In March, 1966, the market price of the stock was in excess of the redemption price of the Debentures and accordingly, conversion, rather than redemption, would be to the advantage of the Debenture holders.

On March 29, 1966, when the conversion privilege had expired, 92.8% of the outstanding face amount of the Debentures had been converted. In accordance with the Indenture, no one who had not tendered or mailed his Debentures by midnight on March 29, 1966, was permitted to convert. Debenture holders who have subsequently redeemed their Debentures have been advised that Boeing has taken the position that such redemption constitutes a waiver of any rights which Debenture holders may establish in this action.

C. *The Instant Action*

This is a consolidated class action brought on behalf of unregistered holders of Boeing's convertible subordinated debentures who failed to exercise their conversion privilege before it terminated on March 29, 1966. Such holders thus lost the market appreciation in their debentures for which they sought over $4,000,000 in damages.*

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* By order dated October 4, 1966, the District Court consolidated ten separate actions that had been commenced in various federal district courts and directed that they be maintained as a class action on behalf of all persons whose debentures were not surrendered for conversion on or before March 29, 1966. The consolidated complaint named Boeing, all of its directors and Chase as defendants. Prior to trial Chase was dismissed from the case and none of the other defendants except for Boeing and Thomas R. Wilcox, one of its directors, was ever served.

The Debenture holders' action was premised on four principal points.

(i) that by failing to issue a news release at the time it selected the redemption date of the Debentures, Boeing failed to comply with the "publicity requirements" of the NYSE Company Manual in effect in 1966. As a result, Boeing is civilly liable under federal law for violations of such Manual and the Listing Agreement between Boeing and the NYSE pursuant to which the debentures were listed on such exchange on the theory that their requirements are an extension of the 1934 Act and an integral part of the statutory scheme under which exchanges are required to adopt rules.

(ii) that they are third party beneficiaries under state law of the Boeing—NYSE Listing Agreement.

(iii) that the notice by publication provided for in Section 5.02 of the Indenture with respect to the call of the debentures was unconscionable and void as a contract of adhesion and that they are entitled to receive notice in excess of that provided by the Indenture.

(iv) that the call of the Debentures was illegal because it was based upon the conversion rate calculated by Boeing which should have been adjusted pursuant to the provisions of the Indenture because of the declaration of two stock dividends and the issuance of stock to acquire the assets of Vertol Aircraft Corporation.

D. *The District Court's Decision*

On evidence which consisted essentially of an agreed statement of facts, supplemented by testimony of five witnesses over fewer than four trial days, the District Court rejected all of plaintiffs' claims, holding that publicity initiated by Boeing concerning the call of the Debentures

> "was in full compliance with the terms of the Indenture and the Debenture and that is the only contract between plaintiff debenture holders and Boeing. The fact that further publicity was suggested or even required under the Manual of the Exchange [NYSE Company Manual], assuming it was a contract, would not help plaintiffs for defendant Boeing did comply with the publicity requirements of the Exchange" (59a).

The District Court further noted, however, that even if Boeing had not so complied, its failure to do so did not give rise to any implied private cause of action under the 1934 Act (59a); that the notice of the call of the Debentures was "reasonable, valid and adequate"; (50a) and that the conversion rate in effect at the time of the call was correct (58a-59a).

E. *The Court of Appeals' Decision*

The Court of Appeals reversed the District Court's finding that the notice of the call of the Debentures was "reasonable, valid and adequate" (50a), holding that the notice given by Boeing, although it "conformed to the requirements of the Indenture" (21a), had "two deficiencies" (20a). First, it did not "adequately apprise the debenture holders what notice would be given of a redemption call" (20a). That is the Debentures and the prospectus pursuant

to which the Debentures were issued, while indicating that the Debentures could be registered, did not spell out that as a consequence thereof a Debenture holder would receive mailed notice of any call at his registered address (20a). The second deficiency pointed to by the Court of Appeals was the newspaper notice of the call itself which was termed "inadequate" (20a). The Court of Appeals suggested, but did not decide, what additional means of giving notice besides the newspaper publication called for in the Indenture and other publicity given of the call, would have been legally sufficient for these Debenture holders (12a). The Court of Appeals merely implied a "duty of reasonable notice" (21a) in excess of that required by the Indenture (which it found that Boeing had fully complied with (21a)) which "arises out of the contract between Boeing and the debenture holders, pursuant to which Boeing was exercising its right to redeem the debentures" (21a). The Court of Appeals affirmed the District Court's determination that the conversion rate had been properly calculated (30a).

The Court of Appeals reached the state law issue of the adequacy of the notice given to the Boeing Debenture holders only after deciding that the Debenture holders' federal law claim that an implied private cause of action existed under the 1934 Act for alleged violation by Boeing of its NYSE Listing Agreement and Section A-10 of the Company Manual, was a "colorable" one (14a) and in its view "sufficient for jurisdictional purposes in any event" (19a).*

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* The Court of Appeals found it unnecessary to determine whether the District Court was correct in holding that there had not been any violation of the 1939 Act by Boeing (26a).

Reasons for Granting the Writ

That this is an appropriate case for review on certiorari is demonstrated not only by the fact that the Court of Appeals decided an important issue of federal jurisdiction in holding that a federal court may entertain exclusively state law claims when it finds that the federal law claims on which jurisdiction has been premised are only "colorable" and not "substantial", as required by this Court's decision in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966) but also by the fact that the Court of Appeals rendered an important and novel decision with respect to the relationship between a corporation and its debenture holders under state law which the highest court of New York has not yet decided and which creates sweeping new rights for such holders.

ARGUMENT

POINT I

The Court of Appeals Decided an Important Question of Federal Jurisdiction Which Has Not Been, But Should Be, Decided by This Court.

The Court of Appeals rejected plaintiffs' contention that Boeing's failure to comply with its Listing Agreement as well as the NYSE's Company Manual, could give rise to an implied private cause of action under the 1934 Act and held, consistent with its prior decisions, that no such cause of action exists under federal law (12a-19a). Nevertheless, the Court of Appeals held that this federal law claim was "colorable" and therefore sufficient for it

to exercise jurisdiction over the purely state law claims asserted by the Debenture holders (12a, 19a).* In view of this holding that pendent jurisdiction could be based on a federal law claim that is merely "colorable", the question arises as to whether the Court of Appeals erred in not having remanded the case to the District Court with directions to dismiss the non-federal claims for want of jurisdiction. The Court of Appeals' decision raises an important question of federal jurisdiction which has not been, but should be, we submit, decided by this Court.

In support of its retaining jurisdiction over the purely state law claims, the Court of Appeals relied on this Court's decision in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). The *Gibbs* Court indicated that a federal court has the power to decide a pendent state claim if the federal claim has "substance sufficient to confer subject matter jurisdiction on the court", if the state and federal claims derive from a common nucleus of operative fact and if, without regard to their federal or non-federal character, the plaintiff's claims are such that he would ordinarily be expected to try them in one judicial proceeding. 383 U.S. at 725. *See also Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933) ("If the bill or the com-

* In addition to their claims under the federal securities acts, the Debenture holders' consolidated complaint also premised their claims of federal jurisdiction on principles of diversity. This alleged alternate basis for jurisdiction was not discussed by the Court of Appeals and its decision does not purport to rest on that basis, since no effort to apply existing state laws was made, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), nor was any attempt made to determine what state law applied, *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). In any event, the plaintiff class members failed to allege that all of their number sustained damages in excess of the requisite jurisdictional amount. *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973).

plaint sets forth a substantial claim, a case is presented within the federal jurisdiction, . . . ")

The Court of Appeals departed significantly from *Gibbs* by entertaining jurisdiction over state law claims where the federal claim was held to be only "colorable" but not "substantial". If the Court of Appeals, certainly not unmindful of *Gibbs,* had believed that the federal law claim was "substantial", it certainly could have so held. Rather, it has attempted to establish a new test for pendent jurisdiction which does not accord with the decisions of this Court. In light of this attempt to modify the rule in *Gibbs,* it is submitted that this Court ought to decide if a "colorable" federal law claim is sufficient for the exercise of pendent federal jurisdiction over a purely state law claim.

An alleged federal claim is plainly insubstantial if previous decisions of the court have rendered its unsoundness apparent. *See e.g. Hagans* v. *Lavine,* 415 U.S. 528, 537-38 (1974); *Goosby* v. *Osser,* 409 U.S. 512, 518 (1973). The unsoundness of plaintiffs' federal law claim against a NYSE listed company and one of its directors based upon violation of an NYSE rule, had been made unalterably clear in *O'Neill* v. *Maytag,* 339 F.2d 764, 770 (2d Cir. 1964)* which the Court of Appeals did not purport in any way to overrule in its decision in this case.

Pendent jurisdiction in the sense of federal judicial power exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority . . .," U.S. Const., Art. III § 2 and the state and federal claims, assuming the latter are substantial, are so related as to permit

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* *Accord Colonial Realty Corp.* v. *Bache & Co.,* 358 F.2d 178, 182 (2d Cir.), *cert. denied,* 385 U.S. 817 (1966).

the conclusion that the entire action before the court comprises a single constitutional case. *See United Mine Workers* v. *Gibbs,* 383 U.S. at 725. Even if a federal court has the power to entertain a pendent claim, whether it chooses to do so is a question to be resolved by the exercise of discretion, based upon considerations of "judicial economy, convenience and fairness to litigants." *United Mine Workers* v. *Gibbs,* 383 U.S. at 726.

In addition to *Gibbs,* the Court of Appeals cited in support of its jurisdictional holding two cases from other courts of appeals (19a, n. 19). In both *Hudak* v. *Economic Research Analysts, Inc.,* 499 F.2d 996 (5th Cir. 1974) and *Parrent* v. *Midwest Rug Mills, Inc.,* 455 F.2d 123 (7th Cir. 1972) plaintiffs had brought actions for securities fraud, under the federal securities laws, state fraud statutes and principles of common law fraud. In each case, the district court had found that the appropriate statute of limitations did not bar the federal claims and thus proceeded to decide the entire case at trial. In both cases, the courts of appeals reversed the district courts' threshold determinations as to the appropriate statute of limitations and determined that the federal claims were time barred. Each court was then faced with the question of whether, having determined that the federal claims should have been dismissed at the outset, the pendent claims should be adjudicated or rather remanded with directions to dismiss. In view of the obvious substantiality of the federal claims, which, but for the statute of limitations would have been valid causes of action under the 1934 Act, and in view of the common nucleus of operative facts from which both state and federal claims derived, there was no question that the court had the power to decide the entire case. The issue in each was whether

it was an appropriate exercise of discretion to do so. Each court found that elements of fairness and judicial economy supported review of the entire case. *But see Ouzts* v. *Maryland Nat'l Ins. Co.*, 505 F.2d 547 (9th Cir. 1974) (where summary judgment is granted as to federal claims, court lacks jurisdiction to decide non-federal claims) *and Hales* v. *Winn-Dixie Stores, Inc.*, 500 F.2d 836 (4th Cir. 1974).

The case at bar is clearly distinguishable from the two cases cited by the Court of Appeals in support of its decision because this case involves the question of the power—not the discretion—of a federal court to decide a purely state law claim appended to a federal law claim which is colorable—not substantial.

It is submitted that a reed stronger than that grasped by the Court of Appeals is required for the exercise of federal jurisdiction over a pendent state law claim. The importance and novelty of the jurisdictional issue raised by the Court of Appeals merits authoritative disposition by this Court.

POINT II

The Court of Appeals Intruded Unnecessarily Into Questions of Purely State Law and Created an Unwarranted New Right to Notice Under New York Law.

Assuming solely for purposes of this petition that the Court of Appeals had the power to decide the pendent claims, it is clear that the Court created a new right under New York State law which the New York Court of Appeals has not created. In so doing, the Court of Appeals needlessly decided an issue of state law.

There is no dispute in this case that the notice of the call for redemption complied fully with, and indeed was in excess of, the notice which Boeing was required to give under the terms of the Indenture, the lone express contract existing between Boeing and the Debenture holders (21a). The District Court found that Boeing was bound to give "only such notice as was spelled out in the Indenture and the Debenture, which incorporated the Indenture" (47a) and that the notice given was "reasonable, valid and adequate" (50a). Nonetheless, the Court of Appeals, although it recognized that Boeing "complied with the requirements of the Indenture", implied a new duty of reasonable notice owed by Boeing to its Debenture holders contrary to the express language of the Indenture (21a).

In so holding, the Court of Appeals has effectively created a new right in such holders which is neither sanctioned by statute nor established by any decided case. The Court of Appeals decision is at substantial odds with all prior court decisions on this issue and with the law of New York State, the substantive law of which governed the Indenture by virtue of a choice of law clause. *Abramson* v. *Burroughs Corp.* [1971-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶93,456 (S.D.N.Y. 1972); *Kurtz* v. *American Export Industries, Inc.*, 370 N.Y.S.2d 599 (1st Dept. 1975); *Gampel* v. *Burlington Industries, Inc.*, 43 Misc. 2d 846 (Sup. Ct. N.Y. County 1964); *Kaplan* v. *Vornado, Inc.*, 341 F. Supp. 212 (N.D. Ill. 1971); *Kraus* v. *Laclede Gas Co.*, 354 S.W. 2d 327 (St. Louis Ct. App. 1962); *Mueller* v. *Howard Aircraft Corp.*, 329 Ill. App. 570, 70 N.E. 2d 203 (1946).

In a factual situation such as that at bar, which does not involve the notice constitutionally required to be given to interested parties in judicial proceedings where no specific contract providing the terms of such notice exists,

see, e.g., Walker v. *Hutchinson,* 352 U.S. 112 (1956); *New York* v. *New York C. R.R. Co.,* 344 U.S. 293 (1953); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), the creation of a right to notice beyond the provisions of the sole contract binding the parties was unwarranted.

In *United Mine Workers* v. *Gibbs, supra,* this court cautioned that

> "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. . . . [If] it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals". 383 U.S. at 726.

Here, the purely state law claim asserted by the Debenture holders as to the adequacy of the notice given them of the call was the very heart of the case from the time it was commenced in 1966 and this claim could have been maintained separately in a state court. In any event this question had never been decided by the highest court in the state of New York. By asserting pendent jurisdiction over this purely state law claim, the Court of Appeals failed to avoid a needless decision of state law; it need not have

> "tolerate[d] a litigant's effort to impose upon it what is in effect only a state law case." *United Mine Workers* v. *Gibbs,* 383 U.S. at 727.

It is respectfully submitted that this Court's supervisory power should be exercised to review the judgment of the Court of Appeals in situations such as that at bar.

CONCLUSION

For the reasons set forth above, Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit.

Dated: September 22, 1975

Respectfully submitted,

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Thomas R. Wilcox

APPENDICES

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 321-25—September Term, 1974.

(Argued February 26, 1975 Decided July 14, 1975.)

Docket Nos. 74-1157-59, -1165, -1185

WILLIAM R. VAN GEMERT, et al.,

Appellants,

—v.—

THE BOEING CO., et al.,

Appellees.

Before:

LUMBARD, OAKES and TIMBERS,

Circuit Judges.

Suit by holders of convertible debentures who failed to convert prior to company's redemption claiming insufficient notice of redemption provided. The United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge,* held that the notice provided by the company complied with the provisions in the debenture and underlying Trust Indenture; that the Trust Indenture Act of 1939 and the company's Listing Agreement with the New York Stock Exchange were not violated; and that appellants had no standing to raise a claim based upon an alleged failure to make a necessary adjustment in the

conversion rate. Held, that the appellants had stated a valid claim.

Judgment reversed.

STUART D. WECHSLER, KASS, GOODKIND, WECHSLER & GERSTEIN, New York, N.Y.; Sachnoff, Schrager, Jones & Weaver, Ltd., Chicago, Ill.; Elson, Lassers & Wolfe, Chicago, Ill., *for Appellants.*

NORMAN WINER, NATHAN, MANNHEIMER, ASCHE, WINER & FRIEDMAN, New York, N.Y., *for Appellants.*

S. HAZARD GILLESPIE, DAVIS POLK & WARDWELL, New York, N.Y. (David E. Wagoner, Perkins, Coie, Stone, Olsen & Williams, Seattle, Wash., William H. Levit, Jr., Hughes, Hubbard & Reed, Los Angeles, Cal., of counsel), *for Appellees.*

OAKES, *Circuit Judge:*

This appeal is from a judgment dismissing the amended complaint in a consolidation class action brought by non-converting holders of The Boeing Company's "4½% Convertible Subordinated Debentures, due July 1, 1980." The complaint was jurisdictionally based on the Securities Exchange Act of 1934 as amended, the Securities Act of 1933 as amended, the Trust Indenture Act of 1939 as amended and the principles of pendent jurisdiction.[1] The gist of the complaint was that the appellants and their class had inadequate and unreasonable notice of Boeing's intention to redeem or "call" the convertible debentures in question and were hence unable to exercise their conversion

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1 *See* note 19 *infra.*

rights before the deadline in the call of midnight, March 29, 1966. Their damage lay in the fact that the redemption price for each $100 of principal amount of debentures was only $103.25, while under the conversion rate of, at a minimum, two shares of common stock for each $100 of principal amount of debentures, the stock was worth $316.25 on March 29, 1966, the cut-off date for the exercise of conversion privileges, or within 30 days thereafter, $364.00. The named appellants number 56, and the total loss alleged is over $2 million.

The United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*, held that Boeing complied with the notice provisions spelled out in the debentures and in the Indenture of Trust Dated July 1, 1958 (the Indenture), between Boeing and The Chase Manhattan Bank (Chase), Trustee, and that it was required to do no more; that the Trust Indenture Act of 1939, 15 U.S.C. §§77aaa *et seq.*, was not violated; that if Boeing's Listing Agreement with the New York Stock Exchange (NYSE) were violated, it gave appellants no claim for relief; and that even if, as appellants claim, an adjustment in the conversion rate were required, and that failure to make the adjustment gave rise to a cause of action, appellants had no standing to raise the claim since they did not exercise their conversion rights. We reverse and remand on the ground that there was an obligation on Boeing's part to give reasonably adequate notice of the redemption to the debenture holders, which obligation was not fulfilled in this instance.

Most of the facts are not in dispute; indeed, we commend the parties, and the court below, for agreeing to a 59-page statement as to facts, incorporating some 55 exhibits, and to what certain witnesses would testify if called at trial.

THE ISSUE OF DEBENTURES

On July 15, 1958, each Boeing shareholder was given the right to purchase $100 of convertible debentures for each 23 shares of stock then held.[2] The debentures were to pay interest of 4½ per cent per annum and were to be convertible by the debenture-holder into common stock at a rate (subject to adjustment) of two shares per $100 principal amount of debentures. Chase was appointed trustee under the Indenture Agreement, and the debentures, as well as the stock reserved for issuance upon conversion of the debentures, were listed on the NYSE. Application for such listing had been made pursuant to a Listing Agreement between Boeing and the Exchange.

Subscriptions for a total of $29,578,500 of debentures were received[3] and the balance of $1,019,100 was purchased by the underwriters. Chase as trustee then authenticated and the subscription agent delivered by registered mail the entire $30,597,600 aggregate amount of debentures in coupon form to the persons designated in the warrants surrendered or their agents,[4] but no list of these was kept by Boeing or Chase.[5]

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2 Total trading in the debenture rights was 1,702,200, but since no information is available on the number or retrades there is no way of knowing exactly how many rights were not traded. At the least, however, 5,335,248 rights were not traded on the Exchange.

3 One may estimate, from the number of rights not traded on the Exchange, approximately $21 million worth of the debentures were purchased by Boeing stockholders or their donees.

4 Between August 4, 1958, when the debentures were admitted to trading on the NYSE, and March 29, 1966, when conversion rights expired, a total of $68,694,000 face amount of debentures were traded. It is not known how many of the debentures were held by original subscribers at the later date.

5 City Bank-Farmers Trust Company, the subscription agent, retained through the ultimate date on which conversion rights expired the names and addresses of stockholders to whom the warrants were sent, as well

A number of provisions in the debenture, the Indenture Agreement, the prospectus, the registration statement for the debentures and the Listing Agreement with the NYSE dealt with the possible redemption of the debentures by Boeing and the notice debenture-holders were to receive of a redemption call so that they might timely exercise their right to convert the debentures into common stock rather than have their debentures redeemed at face value. The debentures themselves provided:

> The holder of this Debenture is entitled, at his option, at any time on or before July 1, 1980, or in case this Debenture shall be called for redemption prior to such date, *up to and including but not after the tenth day prior to the redemption date, to convert this Debenture* . . . at the principal amount hereof, or such portion hereof, into shares of Capital Stock of the Company . . .
>
> . . . .
>
> The Debentures are *subject to redemption* as a whole or in part, at any time or times, at the option of the Company, *on not less than 30 nor more than 90 days' prior notice, as provided in the Indenture,* at the following redemption prices (expressed in percentages of the principal amount) . . .
>
> . . . .
>
> This Debenture may be registered as to principal upon presentation at the office or agency of the Company, in the Borough of Manhattan, The City of New York, New York, . . .

(Emphasis added.)

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as lists of the names and addresses of stockholders of record for the payment of dividends in May and August of 1958, and the warrants themselves when they were tendered. Although the list of stockholders was destroyed in 1964, the warants which bear the names and addresses of the original subscribers are presently in the possession of a successor agent.

The Indenture itself, a 113-page printed booklet, provides in Art. V, § 5.02, as follows:

> In case the Company shall desire to exercise the right to redeem all or any part of the debentures, as the case may be, pursuant to Section 5.01, it shall publish prior to the date fixed for redemption a notice of such redemption at least twice in an Authorized Newspaper, the first such publication to be not less than 30 days and not more than 90 days before the date fixed for redemption. Such publication shall be in successive weeks but on any day of the week. . . .[6]

The Indenture also provided that debenture-holders who registered their bonds would receive notice by mail of any redemption call by the Boeing directors.

While the prospectus for the debenture issue did not refer to any registration rights, it did state that redemption could occur "on not less than 30 days' and not more than 90 days' published notice."

The NYSE Listing Agreement dated November 5, 1957, incorporated by reference into the listing application filed by Boeing in respect to the debenture issue, provided in Part III, Paragraph 4, as follows:

> 4. The Corporation will *publish immediately to the holders* of any of its securities listed on the Exchange *any action taken* by the Corporation *with respect* to dividends or to the allotment of rights to subscribe or *to any rights or benefits pertaining to the ownership of its securities listed on the Exchange;* and will give prompt notice to the Exchange of any such action; and *will afford the holders of its securities listed on the*

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6 An "Authorized Newspaper" is defined as one published at least five days a week and of general circulation in the borough of Manhattan, N.Y. *See* Indenture, Art. I, § 1.01.

> *Exchange a proper period within which* to record their interests and *to exercise their rights.* . . .

(Emphasis added.)

Section A10 of the NYSE "Company Manual" specifically defines what is meant by publicity in the Listing Agreement:

> Publicity: *The term "publicity,"* as used . . . below, and *as used in the listing agreement* in respect of redemption action, *refers to a general news release, and not to the formal notice or advertisement of redemption* sometimes required by provisions of an indenture or charter.
>
> *Such news release shall be made as soon as possible after corporate action which will lead to, or which looks toward, redemption* is taken . . . and shall be made by the fastest available means, i.e., telephone, telegraph or hand-delivery.
>
> To insure coverage which will adequately inform *the public,* the news should be released to at least *one or more newspapers of general circulation in New York City which regularly publish financial news,* or *to one or more of the national news-wire services* (Associated Press, United Press International), in addition to such other release as the company may elect to make.

Section A10 of the Company Manual also provides specifically that when a convertible security is to be redeemed, the news release must include the rate of conversion and the date and time when the conversion privilege expires. It further provides that in addition to the immediate news release the company must give notice immediately to the NYSE itself, so as to enable the NYSE to take any necessary action with respect to further trading in the security.

THE CALL AND ITS CIRCUMSTANCES—HEREIN OF THE NOTICE ACTUALLY GIVEN

On February 28, 1966, the Boeing board of directors *inter alia* authorized the president, vice president-finance or treasurer to call for redemption on a date to be selected by them or any one of them, all of the convertible debentures outstanding under the indenture of July 1, 1958. That same day a news release, headlining 1965 sales and net earnings, and referring to a contemplated stock increase, stock split and post-split dividends, mentioned that "[t]he company's management was also authorized to call for redemption at a future date all of company's outstanding 4½ percent convertible subordinated debentures." This statement, which did not mention even the tentative dates for redemption and expiration of the conversion rights of debenture holders that had been settled upon, was released by the Boeing "News Bureau" nationally to the financial editors of the New York Times, the New York Herald-Tribune, the Wall Street Journal and other major national newspapers, in addition to the major wire services (Associated Press, United Press International and Dow Jones & Co.).

A short time after the February 28 board meeting, Boeing firmed up the key dates, complied with the indenture notice requirements and communicated to some extent with the Exchange proper. On March 2, 1966, at the home office in Seattle, at a meeting of Boeing officers, bankers and lawyers, it was decided to fix March 8 as the date for the first publication of the formal notice of redemption, April 8 as the redemption date and March 29 as the date for expiration of the conversion privilege. The second date for publication of the formal notice, March 18, was also fixed upon at this March 2 meeting, and Chase was notified to publish the redemption notice on those dates in all edi-

tions of the Wall Street Journal. All editions of the Journal carried the formal notices on March 8 and 18; the notices were in due form if not of extensive size.[7] It is conceded by the appellants that the formal requirements of the Indenture were met by the Company and Trustee.

It was not until March 7, the day before the publication of the first formal notice of redemption, that the NYSE was itself notified of the firmed-up dates for redemption,[8] conversion and notice. This was done by a telephone call from Company counsel in Seattle to the Exchange. While the court below found in part that "Boeing did comply with the publicity requirements of the Exchange" and while Company counsel "felt" on the basis of his telephone call "that we had complied with the recommended procedures [of the Stock Exchange Manual]," this finding and feeling are in the face of Boeing's response *admitting* appellants' demand for admission

> That Boeing did not issue any general publicity release, as that term is defined in Section A-10 of the New York Stock Exchange Company manual, concerning the call of the debentures during the period from March 1, through March 24, 1966.

This admission was reconfirmed by counsel for Boeing below and on appeal in the course of an "opening" statement to the court. The original news release of February 28 did not qualify since the dates of conversion and redemption had not been fixed and the Manual requires in the case of convertible securities that the publicity set forth "the rate of conversion and the date and time when the conversion privilege will finally expire" and that if

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7 We estimate their size as 5" x 5½".

8 The Exchange had been sent a communication concerning the redemption on March 1, 1966, but at that time no redemption date had been established.

such data are not known at the time publicity is given initially, "similar publicity shall be given immediately it becomes known or determined." The formal notices did not qualify since the Manual refers to a "general news release," and not to the formal notice or advertisement of redemption. In this regard it is interesting to note that a letter dated March 9 from the stock list department of the Exchange to Boeing indicates that "We have noted the recent advertisement advising of the call for redemption" and also asks for a copy of the authorizing resolution.

There was, in short, no general news release as called for by the Listing Agreement as amplified in the Company Manual until on the eve of expiration of the conversion rights, March 25, 1966, it appeared that $10,849,300 face amount of debentures—over one-half of those outstanding at that time—remained unconverted. At that point Boeing issued a press release[9] and then on March

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9 DEBENTURE CONVERSION DATE MARCH 29

Final date for conversion of The Boeing Company's 4½ per cent convertible subordinated debentures to Boeing common stock is Tuesday, March 29, as announced in advertising by the company on March 8, 9 and 10.

The conversion rights provide for issuance of two shares of common stock in the company for each $100 bond. The company's notice of redemption announced that all outstanding debentures would be redeemed on or after April 8 at the redemption price of 103.25 per cent of their principal amount, together with accrued interest to that date.

Closing price of the stock as of March 25 was $154.5, representing a substantial advantage to holders of the bonds if the conversion is elected.

From January 1, 1965 through March 25, 1966, the sales price for the common stock of The Boeing Company ranged from a high of $175.25 to a low of $60.375 per share. As was pointed out in the notice of redemption, so long as the market price of the common stock is $52.24 or more per share, a debenture holder would receive upon conversion before the March 29 deadline, common stock having a greater value than the cash he would receive if he surrendered the debenture for redemption.

28 the Company republished its earlier advertisement in all editions of the Wall Street Journal (Eastern, Mid-Western, Pacific Coast and South-West) and the New York Times, and additionally advertisements were placed. This later action had what the court below termed a "dramatic and widespread rippling effect." Some $9,305,000 of debentures were converted on March 28 and 29. The ripples, however, had not spread to the appellants' class by the midnight deadline on the 29th; they literally went to sleep with $1.5 million of debentures that were worth $4 million if only converted.

It is true, however, and the court did properly find, that in addition to the publication of the two formal indenture notices, notices of the dates of the call and the expiration of the conversion privilege on March 29, 1966, were carried on the following services: NYSE ticker on March 8, 23, 24, 25, 26 and 28, 1966; NYSE Bulletin on March 11, 18 and 25, 1966; The Commercial and Financial Chronicle on March 14, 21 and 28, 1966; Standard & Poor's Bond Outlook on March 19, 1966; Standard & Poor's Called Bond Record on March 9, 11, 18 and 25, 1966; Moody's Industrials on March 11, 1966. Articles about these dates were also carried in the Seattle Post Intelligencer on March 25, 1966; the Seattle Times on March 27, 1966; and the Financial World on March 23, 1966; and the notice was also carried in the Associated Press Bond Tables published on one or more days in at least 30 newspapers published in major cities across the United States. But almost all of these notices or items were in fine print, buried in the multitude of information and data published about the financial markets and scarcely of a kind to attract the eye of the average lay investor or debenture holder. On March 9, 1966, the listing in the New York Times for the convertible debentures read, for example: "Boeing cv 4½ s 80." The change

on March 10 was to "Boeing 4½ s 80 cld," giving the investor in Dubuque or Little Rock or Lampasas only 19 days to pick up this change and figure that "cld" meant "called." Proof of the inadequacy of these notices lies in the fact that, despite the dramatic disparity between the value of the debentures unconverted and the conversion stock, over one-half of the debentures outstanding on the date of the first notice remained unconverted until the general publicity release on the eve of expiration of the conversion privilege.[10]

Because the appellants place some emphasis on the fact, although we do not reach their contention of unreasonable notice based on it, we should mention that Boeing made no attempt to mail notice to the original subscribers (which could have been done at concededly nominal expense), and neither Boeing nor Chase inquired of or gave notice to collecting banks which had tendered for collection coupons bearing the payment dates of July 15, 1965, or January 15, 1966, the last two coupons before the redemption, either of which might have had some beneficial effect.[11]

THE CONTENTIONS OF THE PARTIES

Boeing rests its defense primarily upon the notice specified in the debentures and Indenture, pointing out that in 1958 when the debentures were issued, "the risk that actual notice might not be received by subsequent holders of the debentures was clearly accepted by all even re-

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10 On March 8, 1966, $21,514,700 face amount of debentures were still outstanding. On March 25, 1966, as stated, four days before the expiration of the conversion privilege, over one-half of these $10,849,300, had not been converted.

11 Nor do we reach the legal argument under the Trust Indenture Act, 15 U.S.C. § 77bbb, based upon the Indenture's provisions requiring Boeing to give Chase lists of the names and addresses of debenture holders obtained by the former, and the token compliance therewith.

motely familiar with the nature of such debentures." (Brief at 20-21.) It was "just such a risk" that led Boeing to extend to its stockholders and others who were investing $30 million in these securities the opportunity to register, *see Kaplan* v. *Vornado, Inc.*, 341 F. Supp. 212, 216 (N.D. Ill. 1971), an opportunity availed of by only 7 per cent of the debenture holders.[12] For the proposition that notice by publication provided for here was "standard and conformed with the custom and practice prevailing in the trade in 1958," we are referred by Boeing to *Gampel* v. *Burlington Industries, Inc.*, 43 Misc. 2d 820, 252 N.Y.S.2d 500 (Sup. Ct. 1964), where Justice Korn did not discuss the custom and practice in the trade but did hold that publication in the Wall Street Journal even during a newspaper delivery strike conformed to a provision in the Burlington Industries debentures similar to the one in the case at bar.[13]

There are four main strings to the appellants' bow. The first is that Boeing is civilly liable under federal law for violation of the NYSE Listing Agreement and Section A10 of the NYSE Company Manual since their requirements are an extension of the Securities Exchange Act of 1934 and an integral part of the statutory scheme under which exchanges are required to adopt rules, 15 U.S.C. § 78f, which may be ordered by the Commission to be altered, 15 U.S.C. § 78s, and the violation of which may give rise to a civil action under federal law. *Cf. Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135 (7th Cir.), *cert. denied*, 396 U.S. 838 (1969). The second

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12 Through April 8, 1966, $1,838,000 in face amount of the debentures were registered as to principal and interest and $337,700 as to principal only; thus, approximately 7 per cent of the debentures were in fact registered so that their holders thereby automatically received notice from the trustee.

13 *See generally* Miller, *How to Call Your Convertibles*, Har. Bus. Rev. 66 (May/June 1971).

is that appellants are third party beneficiaries under state law of the Boeing-NYSE Listing Agreement, as amplified by the Company Manual. *Lawrence* v. *Fox,* 20 N.Y. 268 (1859). *See Weinberger* v. *New York Stock Exchange,* 335 F. Supp. 139 (S.D.N.Y. 1971) (Gurfein, *J.*) (Exchange liable under agreement with SEC to limited partner of bankrupt member firm inadequately supervised by Exchange). The third claim of appellants is that the Indenture is in the nature of a contract of adhesion, a standardized contract between parties of disparate bargaining power, unconscionable features of which are unenforceable as a matter of policy, a concept perhaps first advanced as to indentures of trust covering convertible debentures in a student note, *Convertible Securities: Holder Who Fails to Convert Before Expiration of the Conversion Period,* 54 Cornell L. Rev. 271 (1969). *Cf. Gray* v. *Zurich Insurance Co.,* 65 Cal.2d 263, 269, 419 P.2d 168, 171, 54 Cal. Rptr. 104, 107 (1966). *See* Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract,* 43 Colum. L. Rev. 629 (1943). The fourth ground is that the call was illegal and therefore void because it was based upon a conversion rate of 2.00 shares per $100 face amount of debentures when as a result of two stock dividends and an acquisition it should have been on a 2.05 or a 2.08 ratio.

THE FEDERAL LAW CLAIM

The claim that Boeing is civilly liable under federal law for violation of the NYSE Listing Agreement and Section A10 of the Company Manual is a colorable one. The Listing Agreement and Company Manual are "instruments corresponding" to rules of the Exchange within Section 6(a)(3) of the Securities Exchange Act of 1934, 15 U.S.C. § 78f(a)(3). For the debentures here in question to be listed on the Exchange, application under the Listing

Agreement had to be made. Boeing did not comply with the publicity requirements of the Exchange. In *O'Neill* v. *Maytag*, 339 F.2d 764, 770 (2d Cir. 1964), we did say, however, in the context of a stockholder's derivative suit arising out of an air carrier's purchase of its own stock, that a transaction which violated an Exchange rule did not give rise to a cause of action under federal law, at least against a listed company or its officers.

But as the Supreme Court held in *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), private parties have both derivative and direct rights of action to bring suit for violations of the Securities Exchange Act of 1934 and SEC rules and regulations issued thereunder, rights the explication of which take up a fair amount of Second Circuit judicial time. We extended this at least by dictum to include violation of stock exchange and securities dealers' association rules designed for the direct protection of investors, at least in a suit against an Exchange member, in *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966). There, Judge Friendly, speaking for a unanimous court, pointed out that "the concept of supervised self-regulation is broad enough to encompass a rule which provides what amounts to a substitute for a regulation by the SEC itself." 358 F.2d at 182. Again, "[a] particular stock exchange rule could thus play an integral part in SEC regulation notwithstanding the Commission's decision to take a back-seat role in its promulgation and enforcement . . . ," *id.*, giving as an example NYSE Rule 452 which prohibits a member from voting stock held in a street name without specific instructions from the beneficial owner. *Id.* at n.4. Judge Friendly then went on to say that

> what emerges is that whether the courts are to imply federal civil liability for violation of exchange or dealer association rules by a member cannot be deter-

> mined on the simplistic all-or-nothing basis urged by the two parties; rather, the court must look to the nature of the particular rule and its place in the regulatory scheme, with the party urging the implication of a federal liability carrying a considerably heavier burden of persuasion than when the violation is of the statute or an SEC regulation. The case for implication would be strongest when the rule imposes an explicit duty unknown to the common law.

Id.[14] *See* Lowenfels, *Liability under Exchange Rules*, 2 Rev. of Securities Regulation 841 (1969). *See also Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc., supra* (upholding implied private right based upon the so-called "Know Your Customer" rule, which is Rule 405 of the NYSE, against a party not a stock exchange member).

Nevertheless, we do not now take the position that appellees advance and the court below apparently accepted, that violation of an exchange rule cannot under any circumstances give rise to civil liability under the federal acts. Such a position would be in conflict with our own most recent statements on this subject as well as some of the developing case law. *See, e.g.*, Judge Weinfeld's opinion in *Starkman* v. *Seroussi*, CCH Fed. Sec. L. Rep. ¶ 94,600 [1973-74 transfer binder] (S.D.N.Y. 1974) (con-

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14 The court went on to hold, however, that the rules at issue in *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966), were "near the opposite pole," that is to say, they were "something of a catchall" which related to unethical behavior as well as illegal conduct. It is to be noted that *Colonial Realty* was not the first Second Circuit case dealing with stock exchange rules. In *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), the court recognized that culpable failure by a stock exchange to enforce rules adopted pursuant to § 6(b) of the Securities Exchange Act might give rise to a federal claim against the *exchange* by an investor injured thereby. *See also Silver* v. *NYSE*, 302 F.2d 714, 719 (2d Cir. 1962), *rev'd on other grounds*, 373 U.S. 341 (1963).

duct in violation of Rule 345.17 of the Exchange prohibiting registered representatives from guaranteeing any customer against loss in his account or receiving a share in the profits or sharing in the losses of a customer's account, held actionable); *SEC* v. *First Securities Co. of Chicago*, 463 F.2d 981 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972) (violation of NASD rule protecting public gives rise to private damage action). *Cf. Landy* v. *Federal Deposit Insurance Corp.*, 486 F.2d 139, 164-66 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

It would also run contrary to a position we find inviting, that to the American investing public listing on the New York Stock Exchange carries with it implicit guarantees of trustworthiness. The public generally understands that a company must meet certain qualifications of financial stability, prestige, and fair disclosure, in order to be accepted for that listing, which is in turn so helpful to the sale of the company's securities. Similarly it is held out to the investing public that by dealing in securities listed on the New York Stock Exchange the investor will be dealt with fairly and pursuant to law. This would be particularly true as to the convertible securities market which differs from the market for other corporate debt in that it is composed primiraly of individuals. *See* 1A Dewing, The Financial Policy of Corporations 268-71 (5th ed. 1953).[15] Some investors miss the notices of redemption

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15 The aggregate amount of convertible bonds outstanding of companies listed on the New York Stock Exchange in March of 1963, according to Standard & Poor's Earnings and Rating Bond Guide, was $2,300,000,000, of those listed on the American Stock Exchange $92,000,000, and of unlisted companies $880,000,000. *See* 2 Report of Special Study of Securities Markets made pursuant to Section 19(d) of Securities Exchange Act of 1934 at 23. The Commission is well aware that individual shareholders to whom rights to subscribe to debentures are distributed by the corporations have no control over the time of distribution or whether there should be a distribution. Hence they are "participating in the market involuntarily, so to speak . . . ." *Id.* at 24.

and of expiration of conversion rights, while others "do not know that they should look for them." Note, 54 Cornell L. Rev. at 274 n.16.[16]

Appellees argue, however, that the self-regulation system of the 1934 Act applies in its terms only to Exchange *members*, as opposed to *issuers*, and that the legislative history indicated congressional intention not to extend coverage of the Exchange rules and regulations to issuers. In this connection appellees maintain that Congress did consider such an extension as evidenced by a proposed § 12(b)(1) to the Securities Exchange Act quoted in Cong. Rec. 8584 (1934), which was never adopted. *Id.* at 8586. The provision, however, was to require listed companies to agree with the Exchange to comply with the Exchange Act and the Commission's rules and regulations, and much of the debate related to whether the provision was necessary at all since such companies would have to comply with the law regardless of any such agreement.[17] Omitting the section

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16 Cases involving generally broad standards of conduct and having nothing to do with disclosure, *see, e.g., Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), *modified on other grounds*, 430 F.2d 1202 (9th Cir. 1970), require the presence of fraud to create a right of action under federal law, but this is because the only action or conduct proscribed by the rule is fraudulent conduct. Here, however, is involved a notice or notification rule.

17 Senator Hastings made the following statement in connection with the legislation:

> I do not quite understand why they want to get the issuer of the security on record, in the form of an agreement, not to violate a particular law, because it must be admitted that, if the law itself is valid, and if the rules and regulations made by the commission are valid, and the person entering into the agreement has brought himself within the law by offering his securities for sale, then certainly, it seems to me, the point of compelling him to sign a paper that he will abide by the laws and rules made by the commission must have back of it something which those of us who studied the bill do not quite understand.

78 Cong. Rec. at 8585 (1934). While Senator Hastings' amendment was defeated, the language he objected to was deleted in conference.

in question would apparently indicate merely a recognition that the provision was unnecessary. The legislative history is thus at most equivocal on the question whether Congress intended to insulate issuers from liability in the event that they violated an Exchange rule.[18]

Appellees argue also that the Exchange's remedies are limited to delisting. *See* Report of Special Study of Security Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., 1st Sess., Pt. IV, ch. XII at 566-67; *Intercontinental Industries, Inc.* v. *American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972) (permitting delisting). But no authority holds that the exclusive remedy against a listed company is delisting. The claim for relief is sufficient for jurisdictional purposes in any event.[19]

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18 Provisions of the Listing Agreement requiring the corporation to, *e.g.*, "promptly notify the Exchange of any changes of officers or directors," Part I, 2, would not seem to give rise in any event to a liability to a securities holder. The provisions of the Listing Agreement here in question, however, were to "afford the holders of its securities listed on the Exchange a proper period within which . . . to exercise their rights . . . ."

19 *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 724 (1966). *See Hudak* v. *Economic Research Analysts, Inc.*, 499 F.2d 996, 1001 (5th Cir. 1974); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123, 129 (7th Cir. 1972). The writer of the opinion for himself alone would hold that even if there were such a duty it would be essentially coterminus with a contractual duty to the appellants as third party beneficiaries. As he views it, the limited notification provisions of the Indenture and debenture were modified by virtue of the application for listing on the stock exchange, which specifically incorporated by reference the Listing Agreement of November 5, 1957, to which we have so frequently alluded. *See Lawrence* v. *Fox*, 20 N.Y. 268 (1859); *Seaver* v. *Ransom*, 224 N.Y. 233, 120 N.E. 639 (1918); *Weinberger* v. *NYSE*, 335 F. Supp. 139 (S.D.N.Y. 1971). The duty of a listed company to its own securities holders to treat them fairly is founded in fundamental concepts of the law pertaining to corporate fiduciaries. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Pepper* v. *Litton*, 308 U.S. 295 (1939); *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973). Security holders of a

THE INADEQUACY OF THE BOEING NOTICE

The notice Boeing gave, we hold, had two deficiencies. First, Boeing did not adequately apprise the debenture holders what notice would be given of a redemption call. Investors were not informed by the prospectus or by the debentures that they could receive mail notice by registering their debentures, and that otherwise they would have to rely primarily on finding one of the scheduled advertisements in the newspaper or on keeping a constant eye on the bond tables. Second, the newspaper notice given by Boeing was itself inadequate.

The first factor we think highly significant. Many of the debenture holders might well have decided to register their bonds, had the significance of registration, or of the failure to register, been brought home in the materials generally available to the purchasers of the debentures. No detailed information as to notice was given on the face of the debentures, even in the fine print. The debentures stated simply:

> The debentures are subject to redemption, as a whole or in part, at any time or times, at the option of the Company, in not less than 30 nor more than 90 days' prior notice, as provided in the Indenture . . .

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corporation are in a very real sense creditor beneficiaries, *see* 1 Restatement of Contracts § 136 (1932), to whom an underlying duty of fair treatment is owed by the corporation or majority stockholders or controlling directors and officers thereof. While it may be said that the Indenture itself is a contract, *Kaplan* v. *Vornado, Inc.*, 341 F. Supp. 212 (N.D. Ill. 1971); *Buchman* v. *American Foam Rubber Corp.*, 250 F. Supp. 60 (S.D.N.Y. 1965), it was clearly entered into with listing on the NYSE in mind and was substantially simultaneous in execution and coordinate in operation with the listing application. On this basis it would be unnecessary in the writer's view to reach the ground upon which the court relies, but since this view is individual only, he joins in the ground for decision taken.

There was no indication that registration would mean that a debenture holder would receive mail notice. Nor was there any indication of the extent of newspaper notice to be provided—either as to the papers that would be used or how often the notice would be published. Debenture holders were simply referred by the debenture, as well as by the prospectus, to the 113-page Indenture Agreement, which, to be sure, was available to debenture holders or prospective purchasers upon request, but which was not circulated generally with the warrants or debentures.

We have dwelt at length in the facts on the newspaper notice actually given. While it may have conformed to the requirements of the Indenture it was simply insufficient to give fair and reasonable notice to the debenture holders.

The duty of reasonable notice arises out of the contract between Boeing and the debenture holders, pursuant to which Boeing was exercising its right to redeem the debentures. An issuer of debentures has a duty to give adequate notice either on the face of the debentures, *Abramson* v. *Burroughs Corp.*, CCH Fed. Sec. L. Rep. [1971-72 transfer binder] ¶ 93,456 (S.D.N.Y. 1972) (Lumbard, *C.J.*, sitting by designation), or in some other way, of the notice to be provided in the event the company decides to redeem the debentures. Absent such advice as to the specific notice agreed upon by the issuer and the trustee for the debenture holders, the debenture holders' reasonable expectations as to notice should be protected.

For less sophisticated investors (it will be recalled that warrants for the purchase of debentures were issued to *all* Boeing shareholders), putting the notice provisions only in the 113-page Indenture Agreement was effectively no notice at all. It was not reasonable for Boeing to expect these investors to send off for, and then to read under-

standingly, the 113-page Indenture Agreement referred to in both the prospectus and the debentures themselves in order to find out what notice would be provided in the event of redemption.

Boeing could very easily have run more than two advertisements in a single paper prior to the eleventh hour (March 28), at which time it issued its belated news release and advertised for the third time in the Wall Street Journal and for the first time in the New York Times. Moreover, in the same period that the debentures were in the process of being redeemed, Boeing was preparing for its annual meeting (to be held April 24). Proxy materials were being prepared throughout March and were finally mailed sometime between March 24 and March 30. Management could readily have arranged the redemption dates and the proxy mailing so that notice of the redemption dates could have been included in the envelope with the proxy materials. Thus at no extra cost except that of printing brief notices, at least all Boeing shareholders would have received mail notice, and presumably a significant number of the plaintiff class owned Boeing common stock, as well as debentures, in 1966. Had Boeing attempted such mail notice, or mail notice to original subscribers, and also given further newspaper publicity either by appropriate news releases or advertising earlier in the redemption period, we would have a different case and reasonable and sufficient notice might well be found.

Nothing that we have said is inconsistent with either *Abramson* v. *Burroughs Corp., supra,* or with *Kaplan* v. *Vornado, Inc., supra.* These cases are distinguishable on their facts as well as in respect to the legal arguments made.

In *Abramson* the court was presented with the claim that Rule 10b-5 was violated in connection with the sale

of certain convertible debentures. As here, a nonconverting debenture holder was suing for the amounts lost when he failed to convert before the expiration of the conversion period and he challenged the notice procedures in connection with the redemption. In *Abramson,* however, the principal contention was that there were material omissions in the *prospectus* issued in connection with the sale of the debentures. Abramson alleged that the notice provisions in the prospectus were misleading in that they omitted the nature and frequency of notice that bondholders would receive.

Judge Lumbard in *Abramson* found quite to the contrary that the face of the debentures—unlike those here—stated exactly what notice would be provided, notice which incidentally was at least twice that required here, making specific reference to publication once a week for four weeks in a newspaper of general circulation in New York and one in Detroit. Thus the Burroughs debentures in *Abramson* specifically informed the investor where and how often notice of redemption would be published so that he could make a reasonable evaluation of the likelihood that he would receive such notice or take steps to increase the chances that he would see it either by subscribing to the Wall Street Journal or the like, by contacting a broker to handle the matter for him, or by registration.[20]

The notice provisions in *Abramson* were minimal but sufficient to clear judicial approval; the notice here was

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20 In *Abramson,* moreover, the court emphasized that the debentures in issue specifically stated on their face that the bonds could be registered, and if registered that notice of a call would be provided to registered holders by mail. The court therefore concluded that the nonconverting debenture holders had themselves to blame for not receiving notice. Here, there was no such explicit information on the Boeing debentures. While the debentures did state that they could be registered, as we have said, there was no indication that registration would protect the investor by providing him with notice by mail.

significantly less. Moreover, the Boeing debentures themselves were somewhat misleading. While they indicated that redemption could be made on not less than 30 days' notice, one would have had to have been, if not a lawyer, at least an experienced and knowledgeable investor, to read the fine print two paragraphs previously which said that the conversion right ran only "to and including but not after the tenth day prior to the redemption date . . . ."

In *Kaplan* v. *Vornado, Inc., supra,* where the percentage of nonredeeming debenture holders was under 3 per cent as opposed to the 7 per cent here, in addition to notices published in the New York Times in accordance with the indenture agreement there was a press release *prior* thereto which resulted in publications of the announcement of redemption in the Wall Street Journal, Women's Wear Daily, Daily News Record, Homes Furnishing Daily, and on the Reuters and Dow-Jones wire services. The court in *Kaplan* specifically found that "the essential facts of the defendant's redemption and of the termination of the holders' conversion rights were printed in these news items." 341 F. Supp. at 213.[21]

What one buys when purchasing a convertible debenture in addition to the debt obligation of the company incurred thereby is principally the expectation that the stock will increase sufficiently in value that the conversion right will make the debenture worth more than the debt. The debenture holder relies on the opportunity to make a proper conversion on due notice. Any loss occurring to him from failure to convert, as here, is not from a risk inherent in his investment but rather from unsatisfactory notification procedures. *See* Note, 54 Cornell L. Rev. at

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21 The writer would note that in *Kaplan* the company did indeed comply with the NYSE Listing Agreement-Company Manual requirement of a general news release at the start of the redemption.

271. *See also* Miller, *How to Call Your Convertibles*, Harv. Bus. Rev. 66, May/June 1971.[22] The debenture holder's expectancy is that he will receive reasonable notice and it is his reliance on this expectancy that the courts will protect. *See generally* Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52, 373 (1936-37). *See, e.g., Associated Perfumers, Inc.* v. *Andelman*, 316 Mass. 176, 55 N.E.2d 209 (1944). *See also Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3611 (U.S. May 19, 1975). Had there been proper publication, a reasonable investor undoubtedly would have taken action to prevent the loss occurring to him.

Of course, it may be suggested that the appellee corporation itself was not the beneficiary of the appellants' loss; rather, the corporate stockholders benefited by not having their stock watered down by the number of shares necessary to convert appellants' debentures. But an award against Boeing will in effect tend to reduce *pro tanto* the equity of shareholders in the corporation and thus to a large extent those who were benefited, one might almost say unjustly enriched, will be the ones who pay appellants' loss.[23]

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22 Obviously, where a conversion is not made there may be costs to the company itself which unnecessarily has to make redemption payouts. Miller, Harv. Bus. Rev. at 67. Miller goes on to say that "newspapers have *not* proved an effective conduit, and because of this the corporate officer must concentrate on the mailing approach." Perhaps one solution to the overall problem would be the English one, whereby the convertible debenture is considered converted once the total principal amount of the issue outstanding is less than 25 per cent of its original size. *Id.* at 70.

23 On the remand for a determination of damages, it might be appropriate for the district court to allow Boeing to meet the liability resulting from this case by issuing stock. That is what the plaintiffs would have had if they had received notice of the redemption call, and one of the purposes of the redemption was to enable the company

On the foregoing basis it is unnecessary for us to determine whether there is any cause of action under the Trust Indenture Act, 15 U.S.C. § 77bbb, as appellants contend. Nor, because appellants would not have standing to assert it, do we ground liability upon or make reference in the context of liability to appellants' argument that the call was illegal in the first instance because it was based upon an improper conversion rate.

DAMAGES AND THE "CONVERSION RATE"

We must, however, in remanding to the district court for a determination of damages, take note of the conversion rate argument which was rejected by the court below. That argument was essentially that the 4 per cent stock dividend declared in November, 1958, the 2 per cent stock dividend declared in November, 1959, and the acquisition by Boeing on March 31, 1960, of substantially all the assets of Vertol Aircraft Corp. necessitated an adjustment in the conversion rate of two shares of Boeing stock for each $100 of debentures in accordance with Section 4.05 of the Indenture.[24] At all times after these three transactions, Boeing treated the conversion rate as 2.0448. Because that rate was under 2.045, no adjustment was required under the Indenture § 4.05(f), which provided in part that

> Whenever the amount by which the conversion rate would be changed in accordance with the foregoing provisions of this Section 4.05 is less than one-twentieth of a share of Capital Stock the Company at its option need not make such adjustment at that time.

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to exchange debt for equity capital. It would thus seem appropriate for Boeing to be able to issue stock to meet all or part of this liability, with, of course, the shares being valued according to their market value at date of issuance.

24 The section is four printed pages long and therefore will not be reprinted here in its entirety.

Appellants on the other hand contend that the proper conversion rate was at least 2.045 or as high as 2.08.

On November 4, 1958, Boeing declared a 4 per cent stock dividend and issued 281,537 shares therefor. Section 4.05(b)iv states that in the case of shares so issued the consideration therefor shall be "deemed to be the number of shares so issued multiplied by the market value thereof." [25] Boeing initially calculated the market value by including the stock dividend shares in the number of shares outstanding to obtain the market value of the post dividend stock, *i.e.*, by dividing the closing price of the stock on November 4 of $56.875 by 1.04 since there were 104 shares where there had been 100. This resulted in a market value figure rounded off to $54.75 which, multiplied by the number of stock dividend shares issued, gave a total consideration therefor of $15,414,151.[26] On this basis the calculated rate was 1.9927 but since the indenture required that the conversion rate not be below 2.00, note

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25 Market value in connection with a limited stock dividend is defined in Section 1.01 as follows:

> For the purposes of this definition market value shall mean the last reported sale price of the Capital Stock of the New York Stock Exchange (or if not listed on the New York Stock Exchange, then on any national securities exchange where listed) on the date of declaration of each stock dividend involved or, if there shall not have been a sale on such date, on the basis of the average of the bid and asked quotations therefor on said exchange on such date, or if the Capital Stock shall not then be listed on any national securities exchange, on the basis of the average of the bid and asked quotations in the over-the-counter market on such date.

26 That consideration and the number of shares issued were to be added to the initial consideration of $351,872,350 and 7,037,447 (valued at $50 per share) shares. Under the basic conversion rate formula the product of $100 and the number of resulting shares is divided by the aggregate consideration. "The resulting quotient, adjusted to the nearest one-hundredth, shall thereafter be the conversion rate (until further adjusted) if it is greater than the basic conversion rate [of 2.00 shares for each $100 debenture]." Sec. 4.05(a). But if the adjusted rate is *less* than 2.00 the basic conversion rate of 2.00 governs.

26 *supra*, the rate remained at 2.00. Appellants agree that the rate should be 2.00 but contend that the consideration for the stock dividend shares should be treated as at $14,076,850, the figure which would result from a flat 2.00 or $50 per share rate (above which stock dividend shares could not be valued under the limitations of Section 4.05(a), note 26 *supra*).

Initially the 2 per cent stock dividend of 147,489 shares on November 2, 1959, was treated by Boeing in the same way as the previous year's dividend. The November 2, 1959, closing price of $30.375 per share was divided by 1.02 to obtain a quotient of $29.77 which, multiplied by the number of shares (147,489), gave additional consideration of $4,390,748 to be added to the aggregate consideration (under Section 4.05(b))[27] after the prior stock dividend.

The gist of appellants' complaint about the conversion rate is that in connection with the acquisition of Vertol Aircraft assets in 1960 for 472,736 shares of Boeing, not only were the Vertol assets overevaluated and evaluated at the wrong time so as to obtain the highest evaluation, but the prior stock dividend adjustments were recomputed to the debenture holders' disadvantage. The argument is that all this was done having the conversion rate precisely in mind and with the purpose of keeping it at 2.044999 or below so as to avoid adjustment. (See Exhibit 28.)

The recomputation of the stock dividend adjustments was as follows. The full share price of $56.875 at the close of the 1958 dividend day was taken, that is, the stock dividend shares were not included in the number of shares outstanding. Thus the consideration received was calculated at $16,012,417 (281,537 x 56.875) rather than

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27 Appellants overlook the aggregate aspect of Section 4.05(b).

the $15,414,151 previously used. The same was done in connection with the 1959 2 per cent stock dividend, resulting in increased consideration of $4,479,979 rather than the $4,390,748 previously used. Appellants urge that Boeing thereby "added" consideration received of $1,935,-567 from the 1958 dividend (because appellants would treat that as $14,075,850) and $87,843 from the 1959 dividend, thus leaving at the end of this recomputation a conversion rate of 2.0052 rather than one of 2.0161. But the lower court found, and we agree, that while appellants' computations, or at least Boeing's original ones, better represent the economic realities and more accurately follow general accounting practice, there was discretion in the Board under Section 1.01, note 25 *supra*, not to include the dividend shares in computing the market value.

In connection with the Vertol acquisition, the value placed on it for purposes of determination of the conversion rate was the market value of the Boeing stock on November 13, 1959, at 33⅝, for a total of $15,895,748. Appellants argue that three different valuations would have been more accurate and fairer: the valuation on March 31, 1960, of the Vertol assets as recorded on the Boeing books at $12,435,138.47; that on January 18, 1960, when the contract of acquisition was signed and the Boeing stock worth 30⅝; or that on March 30, 1960, when the contract was closed and the Boeing stock worth 24⅛. Any one of these valuation measures would have increased the conversion ratio to over 2.045. But Section 4.05(b)(2) of the Indenture provided that "in the case of the issuance of shares for consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as determined by the board of directors." The district court's finding was that there was no evidence that Boeing "had any purpose of delib-

erately hurting its debenture holders" and that while it was true that on November 13, 1959, the acquisition was still tentative, the board of directors had a colorable right to fix the fair value of the consideration as of November 13, 1959. That decision was one made, the court below found, in good faith and with the approval of accountants, auditors, investment bankers and counsel. Consequently, the court found that the decision was not subject to attack. *See Morris* v. *Standard Gas & Electric Co.*, 31 Del. Ch. 20, 63 A.2d 577 (1949). We do not believe the trial court's findings clearly erroneous. On those findings the conclusion of law was correct. In short, we affirm so much of the trial court's opinion as relates to the conversion rate.

Judgment affirmed in part; reversed and remanded in part.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION

66 Civ. 1820

WILLIAM R. VAN GEMERT, et al.,

Plaintiffs,

—v.—

THE BOEING COMPANY (formerly BOEING AIRPLANE COMPANY), et al.,

Defendants.

NATHAN, MANNHEIMER, ASCHE, WINER & FRIEDMAN, ESQS., and IRVING STEINMAN, ESQ., New York, New York, Attorneys for Committee of Plaintiffs (NORMAN WINER, IRVING STEINMAN, and SAMUEL WEINSTEIN, Esqs., of Counsel).

KASS, GOODKIND, WECHSLER & GERSTEIN, ESQS., New York, New York, Attorneys for Plaintiffs (STUART D. WECHSLER and MICHAEL P. FUCHS, Esqs., of Counsel).

DAVIS POLK & WARDWELL, ESQS., New York, New York, Attorneys for Defendants (S. HAZARD GILLESPIE and WILLIAM H. LEVIT, JR., Esqs., of Counsel).

RYAN, J.:

This is a consolidated class action brought by former and present holders of unregistered convertible debentures issued by BOEING COMPANY to recover for losses arising out of the Company's refusal to convert the debentures after March 29, 1966, the expiration date set by it for the exercise of conversion rights.

Originally, separate actions were filed by various plaintiffs against defendant and its directors in California, Pennsylvania, Florida and Washington, D.C. By order of October 4, 1966, these ten actions were ordered maintained as class actions; a consolidated amended complaint was filed and a consolidated trial had. The order declared the action brought "on behalf of a class comprised of plaintiffs and all other present and former holders of The Boeing Company (formerly Boeing Airplane Company) 4-½% convertible subordinated debentures due July 1, 1980 and calls for redemption on April 8, 1966, whose debentures were not surrendered for conversion on or before March 29, 1966." The class represents but 7.2% of all the holders, aggregating $1,544,300 out of a total of $20,085,700 who did convert.

Trial was had before the Court on an agreed statement of facts, which was subject only to objections as to relevancy and materiality and to further testimony by witnesses.

The complaint contains thirteen counts and charges violations of the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1933 and common law breach of contract.

The principal claims raised by the complaint are:

1. That BOEING forfeited its right to terminate plaintiffs' option to convert the debentures because it breached

its contract with plaintiffs in that it failed (a) to change and publish the conversion rate as required by the Indenture; (b) to file with the Trustee under the Indenture a statement setting forth the new rate; and (c) to set aside sufficient shares to satisfy the conversion at the new rate. These requirements, plaintiffs allege, were conditions precedent to exercising the call. Plaintiffs contend that the conversion rate of 2 shares for one debenture should have been adjusted to 2.07 shares for one debenture.

2. That the nature of the call given by defendants was insufficient for the ordinary person, in view of the fact that the Indenture was a contract of "adhesion", and that this is the test to be applied, and not whether the notice satisfied the language of the Indenture.

3. That the defendants failed to comply with the Rules of the New York Stock Exchange respecting publicity on calls, which rules were tantamount to a contract for the benefit of plaintiffs as investors and third party beneficiaries.

The damages sought are $4,380,937.82 with interest at 7%, which, it is alleged, represent the value of the debentures held by plaintiffs as well as benefits accrued and lost by way of rights to purchase more stock and debentures, a two-for-one stock split and dividends.

Plaintiffs have attempted to enlarge the class by seeking damages for those bondholders who did convert on time, on the theory that they suffered losses by the alleged failure of defendants to adjust the conversion rate. The court refuses to consider this claim as the order clearly defines the class, and, in fact, plaintiffs' complaint states that suit is brought on behalf of "all holders of debentures who did not convert on or before March 29, 1966."

Plaintiffs would also include in the class those who redeemed after March 29, 1966, on the theory that, under the adjusted rate of conversion, they were entitled to more shares than they received. It is unnecessary to pass upon the merits of this claim in view of our final determination that the class cannot prevail.

I find the following facts to be established by the evidence.

On June 23, 1958, THE BOEING COMPANY authorized the issuance and sale of its 4–½% Convertible Subordinated Debentures, due July 1, 1980, in the aggregate principal amount of $30,597,600. The debentures were issued pursuant to a subscription offer to shareholders of record at the close of business on July 15, 1958. By the subscription offer, each shareholder was given the right to subscribe to the debenture offer in the ratio of $100 principal amount of debenture for each 23 shares of capital stock held on the record date. City Bank-Farmers Trust Company, the subscription agent, mailed 7,037,448 warrants and prospectuses to all stockholders of record. This list of stockholders was kept by the Agent for six years for the purpose of paying dividends and then destroyed in 1964. The warrants, which were exercised by tender to the Agent, were retained until 1966 and are now in the possession of the successor Agent. Each warrant bears the name and address of the stockholder, the number of rights exercised and, if transferred, the name and address of the transferee. BOEING never had a copy of the stockholder list or of the cancelled checks. During the period of the offer, a total of $29,578,000 in full payment of debenture subscriptions was received by City Bank. The total amount of unsubscribed debentures purchased by the underwriters was $1,019,000.

By resolution dated July 14, 1958, the Board of Directors of BOEING set the initial conversion rate for the debentures at two shares of capital stock for each $100 principal amount of debentures, equivalent to a conversion price of $50 per share of capital stock. BOEING reserved 611,952 shares for issuance and in consideration of the surrender for conversion of debentures at this initial conversion rate. The debentures were issued under an Indenture dated July 1, 1958 between BOEING and The Chase Manhattan Bank, Trustee, and under a registration statement filed with the Securities Exchange Commission. The debentures were listed in the New York Stock Exchange under a Listing Agreement, which included a copy of the Indenture.

The debentures were unsecured obligations of BOEING maturing on July 1, 1980 and bearing interest from July 29, 1958 at 4–½% payable semi-annually on January 1 and July 1. They were issued in both coupon and fully registered form, and provision was made that the coupon debentures, at the option of the holder, could be registered as to principal only. This privilege to register was stated twice on the face of the debenture, as well as in several places in the Indenture. Unregistered coupon debentures were transferable by delivery; fully registered debentures and registered coupon debentures were transferable by presentation to the Trustee with appropriate endorsement or written instrument of transfer. The coupons of the coupon debentures, which had been registered as to principal, continued to be payable to bearer and transferable by delivery.

The debentures stated (second paragraph) that they were issued under the Indenture of July 1, 1958 "to which Indenture . . . reference is hereby made for a description of the rights, limitations of rights, obligations, duties and immunities thereunder of the Trustee, the Company and the holders of the Debentures and coupons."

The debentures also called attention to the expiration of the conversion rights ten days prior to the redemption date and specifically incorporated by reference the Indenture provisions relating to the notice of redemption, which read:

> "The holder of this Debenture is entitled, at his option, at any time on or before July 1, 1980, or in case this Debenture shall be called for redemption prior to such date, then to and including but not after the tenth day prior to the redemption date, to convert this Debenture . . . at the principal amount hereof . . . into shares of Capital Stock of the Company, at the conversion rate of two shares of Capital Stock for each $100 principal amount of Debentures. . . . The Debentures are subject to redemption . . . at any time or times, at the option of the Company, on not less than 30 nor more than 90 days' prior notice, as provided in the Indenture . . .".

This was followed by a table entitled "If Redeemed During the 12 Months' Period Ending July 1" (large black letters) setting forth clearly the redemption prices at various dates including the instant date.

The Indenture is a 113 printed page book, which sets forth in extenso the rights and duties of the Company, the Trustee and the Debenture holders, and defines all the terms used.

Thus, Article One, Sec. 1.01, defines Conversion Rate as:

> "the number of shares of Capital Stock into which each $100 principal amount of Debentures may be converted as hereinafter in Article Four provided."

Article Four, Sec. 4.04, states that the Conversion Rate at which Capital Stock shall be issuable upon conversion of

debentures shall be "2 shares of Capital Stock for each $100. principal amount of debentures, the conversion rate being subject to adjustment."

Section 4.05 provides a formula for adjusting the conversion rate in the event certain types of action might be taken by BOEING, including, among others not relevant here, declaration of stock dividends, limited stock dividends and acquisitions and issuance of shares for a consideration other than cash. It provides that, in computing the adjustment if the Company shall issue any capital stock after July 1, 1958, there should be excluded "up to 350,000 shares" (after having been adjusted on the basis of stock dividends) "which may be issued after July 1, 1958 pursuant to the Company's Stock Option Plan or Incentive Compensation Plan for Officers and Employees", and the conversion rate shall be adjusted as follows:

> "$100 shall be multiplied by the number of Capital Stock outstanding after any such issuance . . . and the resulting product shall be divided by the aggregate consideration, determined in accordance with subparagraph (b) of this Section 4.05, received by the Company for its shares of Capital Stock then outstanding . . . . The resulting quotient adjusted to the nearest one-hundredth, shall thereafter be the conversion rate if it is greater than the basic conversion rate. If the resulting quotient . . . is less than the basic conversion rate . . . the conversion rate shall be the basic conversion rate."

Section 4.05(b) also provides that the aggregate consideration referred to above shall be $351,872,350 plus any additional consideration received after July 1, 1958 determined as follows:

"(iv) In the case of shares issued as a Limited Stock Dividend the consideration shall be deemed to be the number of shares so issued multiplied by the market value thereof (as defined in Sec. 1.01) on the date of the declaration thereof."

Section 1.01 defines market value of a Limited Stock Dividend as the last reported sale price of the Capital Stock on the New York Stock Exchange on the date of the declaration of each stock dividend.

Section 4.05(b)(ii) further provides that, in the case of the issuance of shares for a consideration in whole or in part other than cash, the consideration other than cash shall be deemed to be the fair value thereof as determined by the Board of Directors.

Section 4.05(f), in addition, provides that, whenever the amount by which the conversion rate would be changed is less than one-twentieth of a share of capital stock, the Company need not make such adjustment; but, whenever that amount would be changed to more than one-twentieth of a share of capital stock, the Company shall be required to make at that time only that part of such adjustment which will result in changing the conversion rate by the largest possible multiple of one-twentieth of a share of capital stock. Simply put, this means that, if shares of stock are issued for less than $50 a share, an adjustment in the conversion rate may be required and that the formula provides for multiplying the number of shares outstanding by $100 and dividing such figure by the total consideration received for all shares; if the quotient obtained is more than 2.05, an adjustment in the conversion rate is required.

The Indenture further provided that:

"Whenever the Company shall make any adjustment in the conversion rate as herein provided, the Com-

pany shall forthwith (a) file with the Trustee and any conversion agent a statement, signed by the president or any vice president of the Company and by its treasurer or an assistant treasurer, showing in detail the facts requiring such adjustment and the conversion rate that will be effective after such adjustment and (b) publish at least once in an Authorized Newspaper a notice stating that the conversion price has been adjusted and setting forth the adjusted conversion price."

Article Five is of special importance for it deals with redemption of the debentures and sets forth the requirements, for notice, as follows:

"Section 5.02. Notice of Redemption; Partial Redemptions. In case the Company shall desire to exercise the right to redeem all or any part of the Debentures, as the case may be, pursuant to Section 5.01, it shall publish prior to the date fixed for redemption a notice of such redemption at least twice in an Authorized Newspaper, the first such publication to be not less than 30 days and not more than 90 days before the date fixed for redemption. Such publication shall be in successive weeks but on any day of the week. It shall not be necessary for more than one such publication to be made in the same newspaper. A copy of such notice shall be mailed by the Company at least 30 days prior to such redemption date to the holders of the registered Debentures without coupons and the holders of the coupon Debentures registered as to the principal so to be redeemed at their last addresses as they shall appear upon the registry books, but failure to

give or receive such notice by mail, or any defect therein, shall not affect the validity of any proceedings for the redemption of Debentures.

"An 'Authorized Newspaper' is defined in Section 1.01 of the Indenture as follows:

"*Authorized Newspaper*

The term 'Authorized Newspaper' shall mean a newspaper printed in the English language and customarily published at least once a day for at least five days in each calendar week and of general circulation in the Borough of Manhattan, The City of New York, New York, whether or not such newspaper is published on Saturdays, Sundays and legal holidays."

Pursuant to section 7.03 of the Indenture, the Chase Manhattan Bank, as interest paying agent for the debentures, received generally semi-annually and otherwise from time to time coupons which had been detached from the debentures and tendered for the collection of interest. A vast majority of the coupons tendered to the Chase Manhattan Bank came from collecting banks, and Chase Manhattan did not know the identity of the holders of the debentures on whose behalf the coupon tenders were made.

Sections 8.01 and 8.02 of the Indenture require that BOEING give to Chase Manhattan the names and addresses of additional debenture holders who become known to BOEING and its paying agent other than the Trustee. From 1959 to 1966, no such information came to the knowledge of BOEING and it gave none to the Trustee.

I find that, during January and February, 1966, BOEING's Directors and Investment Banking Advisors dis-

cussed the possibility of broadening BOEING's stock base in order to meet its requirements for additional capital needed for plans of building up its jet and supersonic jet transport programs. Of several alternatives discussed, it was determined that calling the debentures for redemption was the best way of raising additional capital while affording the debenture holders an opportunity to participate in a rights offering, and thus broaden BOEING's stock base. On February 24, 1960 at a meeting with Haynes, BOEING's vice president for finance, Thornton, its treasurer, and its Counsel, a possible time schedule for giving notice was discussed, with first publication of the notice of redemption on March 7 or 8, 1966, expiration of the right of conversion on March 29, 1966, and redemption on April 6, 1966. At this meeting, it was decided that Olsen, a member of the firm of counsel for BOEING, should prepare drafts of resolutions for the Board meeting scheduled for February 28, 1966 to authorize an increase in the authorized capital stock, the making of a rights offering of capital stock or securities convertible into capital stock, the issuance of a two-for-one stock split and a call of the debentures for redemption on February 24, or 25, 1966.

Olsen, BOEING's investment bankers and the latter's counsel, discussed as a tentative time schedule that the first publication of the notice of redemption would be on March 7, 1966; that the conversion privilege would expire on March 28, 1966; and that the redemption of the debentures would be on April 6, 1966. On February 27, 1966, Allen, Haynes and Olsen reviewed the draft resolutions which Olsen had prepared for the February 28, 1966 meeting of the Board and the tentative time schedule and a draft press release with respect to several items, including the call for debentures.

On February 28, 1966, Thornton called a Corporate Trust Officer at Chase Manhattan Bank and told him that the Board probably would authorize a call of the debentures for redemption at its meeting that day and advised him to be prepared for redemption of the debentures. A "Tentative Timetable" dated February 28, 1966, prepared by counsel Olsen, was distributed to and reviewed by the Directors who adopted the following resolution:

> "Resolved, that the President, Vice President—Finance, or Treasurer of the Company, or any one of such officers, is hereby authorized to take all such action as they or any one of them deems appropriate or necessary to call for redemption on a date to be selected by them or any one of them, all of the 4½% Convertible Subordinated Debentures of the Company then outstanding under the Indenture dated July 1, 1958, between Boeing Airplane Company and The Chase Manhattan Bank, Trustee."

On February 28, 1966, the Boeing News Bureau issued News Release S-8726 headlined "Boeing Reports 1965 Sales, Net Earnings" and marked "For Immediate Use" which, in part, stated that, at the Board of Directors' meeting held that day, "the Company's management was also authorized to call for redemption at a future date all of the Company's outstanding 4½% convertible subordinated debentures." The release was issued as early as possible, after Board action, to the financial editors of the New York Times, the New York Herald-Tribune, the Wall Street Journal and other major national newspapers, to the Associated Press and the United Press International, to Dow Jones and Company, Inc., to Seattle area newspapers, to aerospace publications and others. On March 1, 1966, BOEING sent a tele-

type to the New York Stock Exchange, advising it that the Board had authorized its officers to call the debentures for redemption, but that the redemption date had not been established, and it confirmed this advice in a letter to the Exchange dated March 2, 1966. On March 1, 1966, Raftery of the Exchange was advised by Olsen that no dates had yet been set for the call; that the resolution of the Board on February 28 had fixed no date but merely authorized BOEING to set the dates; that meetings were scheduled to commence on March 2, 1966 with BOEING's investment bankers and their counsel to develop plans for upcoming financing; and that he would be advised of the dates for the call as soon as they were fixed. However, prior to the meeting of February 28, 1966, Olsen had called Shriver of the Exchange and reviewed with him on a preliminary and confidential basis the tentative time table for the call and obtained his approval.

On March 3, 1966, Chase Manhattan sent BOEING for review and approval a draft of the contemplated notice which had been prepared by counsel for Chase Manhattan in accordance with its practice. Between March 2, and 7, 1966, the tentative dates discussed for the call were: first publication on March 8; expiration of conversion March 29; and redemption April 8, 1966. By March 7, 1966, the firm dates were fixed as March 8 and 18 to be published in all editions of the Wall Street Journal. Olsen then called Raftery of the Exchange, informed him of the dates, and requested him to put them on the Dow Jones Tape and the ticker, which Raftery agreed to do. This Olsen, of counsel for BOEING, considered compliance with the publicity requirements of the Exchange (Section A-10 of the New York Stock Exchange Manual).

I find that on March 8 and 18, 1966, notice of redemption of the debentures, including a statement that the "right of

conversion will terminate at the close of business on March 29, 1966", was published by BOEING in all editions of the Wall Street Journal, viz., the Eastern, Mid-Western, Pacific Coast and Southwestern editions, in the form set forth herewith:

The Boeing Company

(formerly Boeing Airplane Company)

Notice of Redemption of

4½% Convertible Subordinated Debentures, due July 1, 1980

NOTICE IS HEREBY GIVEN that, pursuant to the provisions of the Indenture dated July 1, 1958, between Boeing Airplane Company (now The Boeing Company) (hereinafter called the Company) and The Chase Manhattan Bank (now The Chase Manhattan Bank [National Association]), Trustee, the Company has exercised its option to and will redeem, on April 8, 1966, all of its outstanding 4½% Convertible Subordinated Debentures, due July 1, 1980 (hereinafter called the Debentures), at the redemption price of 103.25% of the principal amount thereof, together with accrued interest to said redemption date.

On and after April 8, 1966, interest on the Debentures shall cease to accrue and the coupons for interest maturing after said date shall be void.

Payment of the redemption price, with accrued interest to the date fixed for redemption, will be made at the principal office of the Trustee upon presentation and surrender for redemption, on or after April 8, 1966, of the Debentures with all coupons appertaining thereto, if any, maturing after the date fixed for redemption. Coupons maturing prior to the redemption date should be detached and surrendered for payment in the usual manner. The Debentures should be presented at The Chase Manhattan Bank N. A. (Corporate Agency Department), 80 Pine Street, New York, New York 10015.

CONVERSION RIGHT

Subject to the provisions of the Indenture, the holder of a Debenture is entitled at his option to convert such Debenture, or any portion thereof which is $100 principal amount or a multiple thereof, into shares of Capital Stock of the Company. This right of conversion will terminate at the close of business on March 29, 1966. The conversion rate now in effect is 2 shares of Capital Stock for each $100 principal amount of Debentures. As provided in the Indenture, no adjustment shall be made for interest accrued on any Debenture surrendered for conversion or for dividends on shares of Capital Stock issuable upon conversion of any Debenture.

From January 1, 1965 through March 3, 1966, the sales price for the Common Stock of the Company on the New York Stock Exchange ranged from a high of $175.25 to a low of $60.375 per share. On March 3, 1966, the last sale of such Common Stock on such Stock Exchange was at $158.25 per share. So long as the market price of Common Stock is $52.24 or more per share, a Debentureholder would receive, upon conversion of Debentures, Common Stock having a greater market value than the cash which such holder would receive if he surrendered Debentures for redemption.

The Boeing Company
By DEAN D. THORNTON, Treasurer

Dated: March 8, 1966

Notices of the dates of the call and the expiration of the conversion privilege on March 29, 1966 were carried on the following services: NYSE ticker on March 8, 23, 24, 25, 26 and 28, 1966; NYSE Bulletin on March 11, 18 and 25, 1966; The Commercial and Financial Chronicle on March 14, 21 and 28, 1966; Standard & Poor's Bond Outlook on March 19, 1966; Standard & Poor's Called Bond Record on March 9, 11, 18 and 25, 1966; Moody's Industrial's on March 11, 1966. Articles about these dates were carried in the Seattle Post Intelligencer on March 25, 1966; the Seattle Times on March 27, 1966; and the Financial World on March 23, 1966. The notice also was carried in the Associated Press Bond Tables published on one or more days in at least 30 newspapers published in major cities across the United States.

On March 25, 1966, BOEING sent the NYSE certified copies of the Board Resolution and Chase Manhattan advised the Exchange that the necessary funds for redemption had been deposited with it. A further press release was sent to representatives of UPI and AP in Seattle and New York, and on March 28, 1966, in all editions of the Wall Street Journal and in the New York Times there appeared the following third notice:

> "Final date for conversion of The Boeing Company's 4½% convertible subordinated debentures to Boeing common stock is Tuesday, March 29. . . . Closing price of the stock as of March 25 was $154.5, representing a substantial advantage to holders of the bonds if the conversion is elected."

BOEING sought legal opinion from its counsel and from the attorneys for its investment bankers and was advised that the Wall Street Journal was a newspaper of general

circulation in New York City and that the published notice of call met the requirements of the Indenture.

Notice of the redemption was given all registered debenture holders and holders of coupon debentures registered as to principal by letter enclosing the notice published on March 8 and 18, 1966 (Section 5.02 Indenture). Neither BOEING nor Chase Manhattan gave notice of redemption by letter to any holders of unregistered bearer debentures.

It is of record that of $21,514,700 face amount of debentures outstanding on March 8, 1966, $19,970,300 or 92.8% were converted during the period following publication of the first notice of redemption on March 8, 1966 to and including March 29, 1966, and that more than $9,000,000 of these were converted following the third publication of March 28, 1966. An additional $115,400 were converted after midnight of March 29, 1966 upon request made to BOEING prior to that time and on a showing that there was a valid excuse for not meeting the deadline strictly. Of all the registered debentures totalling $2,145,200, only three aggregating $400 were not converted; and $1,544,300 coupon debentures (of the class) were not converted.

It appears that discussion was had by BOEING about extending the deadline for exercising the rights of conversion. BOEING was advised by counsel that to do so would effect a change in the terms of the Indenture, and it had no legal right to this.

The Annual Report to stockholders of record for the year 1965, including a letter of transmittal from Allen, President of BOEING, dated February 28, 1966, was sent out between March 24 and March 30, 1966. The letter made no mention of the call, nor did a proxy statement, dated February 28, 1966, which was mailed between March 31 and April 4, 1966 to all stockholders of record as of March 10, 1966.

The 8-K Form filed with the Securities Exchange Commission in February, 1966 made no mention of the proposed call, but it was reported in the 8-K Form of April, 1966.

Against these factual findings, I first consider:

THE NOTICE OF CALL OF THE DEBENTURES

In support of their claim that the notice of call was insufficient to bar the plaintiff-debenture holders from now converting, plaintiffs urge that the defendant had the duty to give notice which met the "reasonable expectations" of the debenture holders, because the Indenture was "a contract of adhesion".

"A contract of adhesion", a term used in reference to insurance contracts, is a contract drawn by one of the contracting parties in which the other party has no choice but to accept or reject. (Williston on Contracts, 3rd Ed. 1961, 1971 Supp.; *Shay* v. *Agricultural Committee,* 299 F. 2d 516 (C.A. 9, 1962); and where the Court will ascertain that meaning of the contract which the weaker party would reasonably expect (*Gray* v. *Zurich Ins. Co.,* 54 Cal.2d 104, 419 P 2d 168).)

By this, plaintiffs urge that defendant BOEING should have done one or more of the following: (a) ascertained the names and addresses of the unregistered bondholders who presented their coupons for the collection of interest annually to Chase Manhattan; (b) traced the warrants which the stockholders had exercised in 1958 to purchase the debentures; (c) sent a letter to all stockholders of record and (d) placed an advertisement in the New York Times.

The answer of the defendant, and one which I hold is conclusive, is that defendant was bound to give only such notice as was spelled out in the Indenture and in the Debenture, which incorporated the Indenture. This called attention to

the Debenture for a definition of the rights of the respective parties and, in addition, repeated the terms of notice of call.

There is no claim here that the debenture or the Indenture provided such minimal notice as to constitute "ritualistic notice in small print on the back pages of a newspaper". (*Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 569 (Ca.A. 2, 1968).) The notice required was not only adequate, but the defendants did more than was required when they published a third time on March 28, 1966 in all editions of the Wall Street Journal and in the New York Times, with the "dramatic and widespread rippling effect" which brought in over 9,000,000 face amount of debentures for redemption. In fact, the very minimal aggregate number of non-converting debenture holders, which constitute the class represented, speaks eloquently for the adequacy of notice given by defendants.

The suggestions made by plaintiffs as to the further notice which might have been given are not only not required by the terms of the Indenture but they would have been impracticable, if not impossible. The warrants, as well as the bearer debentures, were traded repeatedly since 1958, so that it would have been impossible to know in 1966 the names and addresses of the debenture holders. It was stipulated that, of the debentures issued totalling $30,597,600 during these years, $68,694,000 were traded; and that of a total of 7,037,448 rights issued, 1,702,200 rights were traded between July 16 and 28, 1958; as for the stockholders numbering about 50,000, 55% of these had stock in a street name.

Nor would the coupons presented for payment give the names and addresses of the debenture holders. The greater number of these were presented through collecting banks and, although Boeing might have ascertained the owners through the banks, it was under no duty to do so.

Plaintiffs' argument that the majority of the debenture holders never saw the Indenture as they would have had to go to the Trustee or to the Securities Exchange Commission in Washington, is answered by the fact that the debenture itself contained the provisions for notice and the warning that the debentures could be called, as well as by law on the binding effect of the terms of the Indenture as a contract, whether or not they saw it. (*York* v. *Guaranty Trust Company of N.Y.*, 326 U.S. 99; 143 F. 2d 503 (C.A. 2, 1944); U.C.C. Sec. 8-202(1) 2d ed.)

But plaintiffs further argue that the debenture holders are not bound by the terms of the Indenture because these terms were inconsistent with those of the debenture and the Prospectus which accompanied the issue in 1958. Thus, they purport to find some inconsistency in the words "not less than 30 days' notice nor more than 90 days published notice" (Prospectus); "not less than 30 nor more than 90 days prior notice as provided in the Indenture" (debenture); and "the first such publication to be not less than 30 days and not more than 90 days before the date fixed for redemption" (Indenture Section 5.02). They argue that the plaintiffs, as debenture holders, might have thought that this meant 30 days' continuous publication and that any doubt must be resolved in their favor. The language is pristine clear—30 days' prior notice; this was what was given, and more.

Kaplan v. *Vornado,* 341 F. Supp. 212 (N.D., Ill., 1971) is dispositive of this claim. There, in answer to the same argument, the Court held that the debenture holder was bound by the terms of the Indenture, which he did not see, as well as by the terms of the Debenture, which he did not understand; and that the notice was sufficient, even though it was published in a New York newspaper and in various publications which plaintiff, a resident of Kansas, never saw.

In *Abramson* v. *Burroughs Corp.*, 67 Civ. 1426 (S.D. N.Y., 1972), Judge Lumbard held that notice by publication in the New York Times and the Wall Street Journal was reasonable as "best calculated to come to the attention of the Burroughs bondholders" or their brokers, and that publication four times within the thirty days prescribed by the Indenture, with termination of the privilege the fifteenth day prior to the redemption date, was sufficient notice. (*Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950) and the other cases relied on by plaintiffs are not relevant in that, in those cases, the Courts struck a notice by publication as insufficient to bar a party in a judicial proceeding where another kind of notice was possible. *Walker* v. *Hutchinson*, 352 U.S. 112 (1956) condemnation proceedings; *New York* v. *N.Y. Central R.R. Co.*, 344 U.S. 293 (1953) wiping out a tax lien in a bankruptcy proceeding.)

Finally, plaintiffs argue that the defendant violated the Trust Indenture Act, 15 U.S.C. Section 77aaa et seq., in that, under the Indenture by Section 8.01, 8.02, BOEING was required to furnish Chase Manhattan bi-annually with current names and addresses of bondholders and that this would have permitted Chase Manhattan to notify those additional bondholders. The answer to this is that it was stipulated that BOEING had no names to furnish Chase Manhattan and so advised it under the terms of the Indenture.

Plaintiffs held the debentures which clearly stated that they could be registered; plaintiffs could have done so and they would have been notified by mail of the call thus eliminating the real risk of not seeing the notices and press releases. Plaintiffs chose not to do so, and they must bear the consequences (*Kraus* v. *Laclede Gas Co.*, 354 S.W. 2d 327 (St. Louis Ct. of App., 1962)).

I conclude that the notice of call was reasonable, valid and adequate.

I now turn to consideration of:

THE CONVERSION RATE

In an ingenious argument, in order to get around the sufficiency of the notice, plaintiffs next argue that it was a condition precedent to a valid call that defendants adjust and publish an adjusted conversion rate and notify the Trustee; that defendants did not and that this rendered the call invalid and insufficient to cut off debenture holders' right to convert.

The defendants' rejoinder is that the rate of conversion fixed by it was in strict compliance with the terms of the Indenture and that these should not be rewritten to support the plaintiffs' claim; that the Board of Directors made its determination as to the conversion rate with due regard to its dual responsibility to both stockholders and bondholders; that, in any event, an error in the conversion rate would give a claim to those bondholders who did convert relying on the notice and not to plaintiffs who claim they received no notice of the conversion.

Solely for purposes of discussion, I will assume that an error in the conversion rate would void the call and that such an error, even though I find none, would be sufficient to save plaintiff's claim. I turn to that aspect of this suit, and consider the merits of this claim.

There were three transactions which, according to plaintiffs, might have necessitated an adjustment in the conversion rate applicable to the debentures in accordance with Section 4.05 of the Indenture: the 4% stock dividends declared in November, 1958; the 2% stock dividend declared in November, 1959; and the acquisition by BOEING on March 31, 1960 of substantially all of the assets of Vertol Aircraft Corporation.

As of March 10, 1961, up to and including the redemption date of April 8, 1966, BOEING treated the conversion rate as 2.0448, and it contends that this is the proper conversion rate. It is plaintiffs' contention that the proper conversion rate is 2.0725 or more. The significance of this is that, if plaintiffs are right, the debenture holders would have been entitled to additional shares of stock on conversion and additional duties were imposed on defendant under the Indenture which they did not fulfill.

Essentially, it is plaintiffs' contention that initially BOEING computed the value of the 4% stock dividend correctly, but that the following year it recomputed it for the express purpose of keeping the conversion rate from rising above 2.5 at a time when it was negotiating with Vertol in order to injure the debenture holders and benefit its stockholders.

It is of record that on November 3, 1958, BOEING declared a limited stock dividend of 4%. The closing price of Boeing Capital Stock on that date was $56.875 and the number of shares issued under the 4% dividend was 281,537. On or about December 31, 1958, BOEING made a conversion rate computation with respect to this 4% limited stock dividend. BOEING took the November 3, 1958 NYSE closing price of $56.875 and divided it by 1.04 (representing the number of shares including the 4% dividend shares) and reached a figure of $54.75 which was the value of each share after dividend. This figure, multiplied by the number of shares issued, 281,537, resulted in $15,414,151—the total consideration paid for the shares issued. Applying the formula for calculating the conversion rate, the "Conversion Rate Calculator" (Section 4.05), it reached a figure of 1.9927. The numerator being 731,898,400, total number of shares outstanding, divided by the

denominator, the total consideration received therefor or $367,286,501, the conversion rate, therefore, was below 2.05 and it required no adjustment.

On November 2, 1959, BOEING declared a limited stock dividend of 2% and issued 147,489 shares at the market price of $30.375 or a total consideration of $4,479,979. For purposes of this dividend, however, BOEING, in computing the consideration received for the shares, did not divide the market price $30.375 by 1.02 (to include the 2% dividend shares) because if it had, the consideration would have been reduced to $29.77 which result would have required an adjustment in the conversion rate since that quotient would have been 2.0089 instead of 2.0052.

In December, 1959, BOEING then recomputed the 4% limited stock dividend of 1958 to conform to the computation used on the 2% dividend and to exclude the additional 4% shares represented by the dividend so that now it reached a flat market price of $56.875 (not divided by 1.04). The result was that the total consideration for the 281,537 shares issued was $16,012,417, which under the formula still did not change the quotient sufficiently to require adjustment of the conversion rate.

A tabulation of these calculations is as follows:

4% dividend—281,537 shs. x $54.69 =$15,414,151 (corporate accounting method)
" x $56.857=$16,012,417 (Indenture method)

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2% dividend—147,489 shs. x $29.77 =$ 4,390,748 (corporate accounting method)
" x $30.375= $ 4,479,979 (Indenture method)

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Quotients computed according to Section 4.05 of the Indenture:

Quotient for 4% dividend under either method below 2.05: 1.9927; 1.9895
Quotient for 2% dividend under Corporate Method=2.0089
" " Indenture Method=2.0052

(See Defendant's Exhibit No. 20)

Obviously, one of the reasons for the recomputation of the "Conversion Rate Calculator" on this dividend was to conform it to the method used on the 1959 2% stock dividend.

From this, plaintiffs argue that defendant was on a course of deliberating keeping the conversion rate from going up, which would require an adjustment and the setting aside of more shares for the debenture holders when they redeemed their debentures.

Irrespective of the defendant's motive, it is clear that the original computation of the 4% limited stock dividend was not proper under the terms of the Indenture and that the computation of the 2% dividend and the recomputation of the 4% dividend in 1959 was in accordance with the terms of the Indenture. It appears that the 4% stock dividend was originally in 1958 computed according to the usual corporate accounting practice, that is, that the market value of the stock issued was computed by including the additional number of shares outstanding upon payment of the dividend. In the case of the 4% stock dividend, this would be 104 shares and, in the 2% dividend, 102. The terms of the Indenture are clear in that the market value of a limited stock dividend is defined as the last reported sales price on the date of the declaration of the dividend (Section 1.01). Plaintiffs would construe this to mean that this includes the sales price including the additional shares issued as a result of the dividend, or post dividend rather than ex-dividend, arguing that this is the more intelligent meaning because it represents more accurately the market value of the shares. This may be so but the Indenture was drawn by BOEING; how to define market value was its decision to make out of several alternatives. BOEING had a right to so define it, and, having done so, it had not only

the right but the duty to comply with the definition set forth in the Indenture, irrespective of its motive.

Plaintiffs also attack the acquisition by BOEING of the assets of Vertol Aircraft Corporation at what they say was an arbitrary value placed on the stock of BOEING which was issued in exchange, in order to keep the conversion rate below 2.05.

In support of their position, plaintiffs point to the statement made by Vice President Haynes at a Board Meeting on April 4, 1960 after the contract with Vertol had been signed, that:

> "a calculation had been made as to the minimum value that could be placed on the assets of Vertol without an adjustment in the conversion price being required; and that such figure as adjusted for the amounts to be received upon the exercise of options was approximately $15,216,000.",

and to further statements by BOEING's officers that their "basic objective was to avoid dilution of the equity position of the stockholders."

The value placed on the Vertol acquisition was the market value of the BOEING stock on November 13, 1959 at $33–⅝ for a total of $15,895,748.

It is plaintiffs' argument that some other valuation should have been used, either the value of the acquired assets of Vertol on March 31, 1960 as recorded on the books of BOEING at $12,435,138.47 or the value of the BOEING stock at some other date, to wit: either January 18, 1960, when the contract was signed when the stock was $30–⅝; or March 30, 1960 when the contract was closed when the BOEING stock was $24–⅛; either of which figures would have required an adjustment in the conversion rate.

Defendants rely on Section 405(b)(ii) of the Indenture which vests the Board of Directors with the power to fix the "fair value" of the consideration received when stock is issued other than for cash. Defendants represent that the decision of the Board was made after full deliberation, in good faith, with full realization of its duties to the stockholders of BOEING, and upon advice of counsel, its investment bankers and independent accountants.

I find that the facts are as follows:

As early as 1958, BOEING's management had been engaged in discussions with Vertol looking toward the possible acquisition by BOEING of Vertol. A committee, headed by the Company Secretary, was designated to study the matter and recommend; on November 11, 1959, a memorandum containing his and the President's recommendations was sent to the Board. The recommendation was for the acquisition on the basis of an exchange of stock—two shares of BOEING for three shares of Vertol. On November 13, 1959, at an informal meeting of nine of BOEING's thirteen Directors, attended by its President Allen, a firm decision to make the offer to Vertol on the two for three basis was made. On January 18, 1960, the Board formally authorized the execution of a contract with Vertol; the closing was had on March 31, 1960. Between November 13, 1959 and January, 1960, there were several discussions as the details were still tentative. Throughout these negotiations and meetings, defendants were figuring out various valuation theories to determine the result on the conversion rate.

The acquisition was done through a corporate reorganization in which the stockholders of Vertol received two shares of BOEING stock for each three shares of Vertol stock they

owned, and received a total of 448,954 shares of BOEING capital stock. There were also Vertol stock options, which had been granted to employees at a prior time. These stock options amounted to 23,782 shares of BOEING at a value of $644,514; and the total consideration paid by BOEING for the acquisition was 472,736 shares of BOEING at 33-⅝, for an aggregate value of $15,895,748.

This is known as the "barter equation method", which permits consideration to be computed on the basis of shares issued.

The book value of Vertol at $12,435,138.47 was the figure used for the computation of the Pennsylvania State Excise Tax; had BOEING used this value, an adjustment in the conversion rate would have had to be made. Using the value of BOEING stock at 24⅛ as of March 30, 1960, the quotient after applying the formula would have been 2.0687 requiring an adjustment to 2.07 shares; at the value used of $15,895,748 or $15,250,000 (which excluded the options), the quotient remained below 2.05. Thereafter, BOEING continued to use this method of computation for limited stock dividends under the Indenture, with the approval of its independent accountants, its counsel and its Company treasurer.

Plaintiffs admit that the formula provided for in the Indenture had as its purpose the prevention of dilution of stock to the detriment of BOEING stockholders. It was certainly BOEING's duty and right to compute stock in such a way as to prevent its dilution and there is no evidence that it had any purpose of deliberately hurting its debenture holders.

While it is true, as plaintiffs point out, that on November 13, 1959 the matter of the acquisition was still tentative

and does not appear to have been settled until some time in December at the earliest and that the date the contract was signed appears more rational, this Court cannot say that the Board of Directors had no colorable right to fix the "fair value" of the consideration as of November 13, 1959. The decision was carefully taken, not only with the approval of its accountants but of independent auditors, outside counsel, its investment bankers and underwriters, with the unanimous resolution of its Board and in good faith. This is the test rather than whether another method of valuation might seem more appropriate. In fact, plaintiffs admit that they can cite no authority which deals with the fixing of a date for purposes of valuation of antidilution clauses, which this is. As plaintiffs point out, any time stock is issued for consideration less than its market value, there results dilution. The provisions of Section 4.05 of the Indenture were clauses dealing with the problem. There is ample authority to support a decision made by a Board of Directors under similar conditions; in fact, it is conclusive. [*Morris* v. *Standard Gas & Electric Co.,* 31 Del. Ch. 20, 63 A 2d 577 (1949); 11 Fletcher Corporations, Secs. 5221, 5336, 5344 (1971); *Industrial & General Trust, Ltd.* v. *Tod,* 180 N.Y. 215 (1905). *See Matter of Marcus,* 273 App. Div. 725, affd. 303 N.Y. 711 (1951) to the effect that book value is not the true measure of stock; and *Seas Shipping Co.* v. *CIR,* 371 F. 2d 528 (C.A. 2) cert. denied 387 U.S. 943, for use of the barter equation method for tax purposes.]

I conclude that neither the 4% nor the 2% Limited Stock Dividend, nor the acquisition of Vertol, nor any combination of these three events, required an adjustment of the conversion rate. I also conclude that, even if they had so required it and defendant had failed to do so, plaintiffs

who did not convert could not benefit thereby because failure to convert when required to do so would not necessarily have invalidated the call. [6 Williston on Contracts, Sec. 842 (3rd Ed., 1962).]

I also conclude that there is no merit or substance to plaintiffs' final point that the defendant BOEING breached a contract it had made with the New York Stock Exchange, in that it failed to comply with the publicity requirements of the Manual and/or the Listing Agreement.

I have found that the publicity given was more than adequate, that it was in full compliance with the terms of the Indenture and the Debenture, and that is the only contract between plaintiff debenture holders and BOEING. The fact that further publicity was suggested or even required under the Manual of the Exchange, assuming it was a contract, would not help plaintiffs for defendant BOEING did comply with the publicity requirements of the Exchange. But even if it had not complied fully with the publicity requirements of the Manual, no case has yet held that the Manual is a rule of such importance in the "Regulatory Scheme" and as such "integral part in SEC Regulation" that a breach of it would expose defendant to "unexpected civil liability" at the suit of a third party. (*Weinberger* v. *NYSE,* 335 F. Supp. 139 (S.D.N.Y., 1971).) In fact, the law in this Circuit is to the contrary. (*O'Neill* v. *Maytag,* 339 F. 2d 164 (C.A. 2, 1964); *Colonial Realty Corp.* v. *Bache & Co.,* 358 F. 2d 178 (C.A. 2, 1966); *DeRenzis* v. *Levy,* 297 F. Supp. 998 (S.D.N.Y., 1969).)

Buttrey v. *Merrill, Lynch, etc.,* 410 F. 2d 135 (7th Cir., 1969), cert. denied 369 U.S. 848, relied on by plaintiffs, involved a totally different "rule" of the Exchange binding on a member company and plaintiff's claim against the

member broker was upheld in the pleading stage solely because it charged the member company with fraud; the Court specifically saying that mere negligence might not support a federal claim. [*McMaster, Hutchinson & Co.* v. *Rothschild Cor.*, C.C.H. Fed. Sec. L. Rep. #93,541 (N.D., Ill., 1972) which followed, distinguished Buttrey on this ground; *Bush* v. *Bruns, Nordeman & Co.* (S.D.N.Y. 72 Civ. 484), C.C.H. Fed. Sec. L. Rep. #93,674.] What I have said disposes of plaintiffs' third party beneficiary claim.

The Clerk is directed forthwith to enter judgment for defendants dismissing the complaints in the following ten actions on the merits with taxable costs and disbursements:

66 Civ. 1820 Van Gemert v. Boeing
66 Civ. 2384 White v. Boeing
66 Civ. 2385 Berglas v. Boeing
66 Civ. 2640 McNaught v. Boeing
66 Civ. 2786 Winer v. Boeing
66 Civ. 3005 Diener v. Boeing
66 Civ. 3054 Finn v. Boeing
66 Civ. 3403 Mittler v. Boeing
67 Civ. 280 MacMillan v. Boeing
67 Civ. 1053 Hoff v. Boeing

So ordered.

Dated: New York, New York
November 29, 1973

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SYLVESTER J. RYAN
United States District Judge